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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF COMMERCE OF PUERTO RICO
AND THE COMMONWEALTH OF PUERTO RICO,
Petitioners,

v.

ARTURO RAMOS VILLANUEVA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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QUESTIONS PRESENTED

I. Whether the Supreme Court of Puerto Rico erred in applying the doctrine of *Branti* v. *Finkel*, 445 U.S. 507 (1980) in the case at bar, in view of sec. 5.10 of Puerto Rico's Public Service Personnel Act, (3 LPRA 1350) [1] and in so doing; (1) invalidated a state statute on federal grounds (2) incorrectly adjudged a federal right, causing serious hinderance to the effective administration of said statute (3) improperly interpreted, applied or extended this Honorable Supreme Court decision.

II. Whether, in adopting the trial court's findings of facts the judgment of the Supreme Court of Puerto Rico is patently erroneous in relation to the evidence presented and, in so doing, grossly misapplied the doctrine of *Branti* v. *Finkel*, [2] supra.

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[1] See Appendix F, p. 34a.

[2] All parties to the proceedings from the Supreme Court of Puerto Rico, from whose judgment review is sought are included in the caption of the case before this Court.

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OPINIONS BELOW

The Opinions of the Supreme Court of Puerto Rico are not yet reported but appear in the appendix (Appendix A pp. 1a-18a) The Opinion of the Superior Court of Puerto Rico, Aguadilla, Region, not reported, appears in the appendix (Appendix B, pp. 19a-24a)

JURISDICTION

The judgment of the Supreme Court of Puerto Rico was entered on March 31, 1982. A timely petition for rehearing was denied by Order on May 13, 1982 (Appendix C p. 25a).

This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the Constitution of the United States which provides:

> "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment of the Constitution of the United States (Appendix D p. 26a)

3 L.P.R.A. sec. 648 (1965) (Appendix E pp. 28a-33a).

3 L.P.R.A. sec. 1350 (1978) (Appendix F p. 34a).

3 L.P.R.A. sec. 1421 (1978) (Appendix G pp. 35a-37a).

STATEMENT OF THE CASE

A. Trial Stage

Arturo Ramos Villanueva began to work in the Department of Commerce on July 10, 1973. He held the position of Regional Director of the Department of Commerce in Aguadilla. Said position was in the Non-Competitive Service by virtue of Public Law Number 345 of May 12, 1947, as amended (3 L.P.R.A. 648, (1965) See Appendix E pp. 28a-33a).

On February 7, 1977 Honorable Juan Cintron, Secretary of Commerce of Puerto Rico, sent a letter to Ramos Villanueva dismissing him from his position (Classified as Non-Competitive, according to Public Law Number 345, supra, and as position of Trust according to the New Personnel Act Public Law Number 5 of October 14, 1975, (3 L.P.R.R.A. sec. 1350, (1978) Appendix F. p. 34a).

On February 28, 1977 Arturo Ramos Villanueva filed a complaint against the Secretary of Commerce and the Commonwealth of Puerto Rico alleging that his removal constituted an arbitrary action, with clearly political motivations only be-

cause plaintiff was an active member of the Popular Democratic Party, and requesting the Aguadilla Division of the Superior Court of Puerto Rico, to reinstate him in his position.

After a hearing was held and Memoranda was submitted by both parties the Trial Court on January 22, 1981 rendered Judgment finding that Ramos Villanueva's dismissal was mainly due to his political affiliation. It then applied the rule laid down by this Honorable Court in *Branti* v. *Finkel*, supra, and concluded that there was a First Amendment violation and, thus, the dismissal was null. (Appendix B p. 19a).

The Trial Court's finding of facts revealed the following:

Ramos Villanueva was appointed Regional Director of the Department of Commerce for the Aguadilla Region. In such capacity his duties were mainly of an executive nature, including among others:

> (a) to advise the Under-Secretary of the Domestic Commerce Program in matters related to the education and training of commerce personnel; (b) to plan, direct, supervise, and evaluate all technical and administrative activities related to commerce development programs in the region; (c) to establish working methods that facilitate the achievement of the program's goals; (d) to coordinate with other agencies; (e) to advise the Under-Secretary of the Domestic Commerce Program in its activities for the region (Appendix B p. 19a)

It was also indicated in the Trial Courts judgment (Appendix B p. 20a) that the position of Regional Director of Aguadilla was originally created in the Competitive Service but was transferred to the Non-Competitive Service in June, 1973, by request of the Secretary of Commerce. This was so because the Secretary of Commerce needed that the incumbent of said position be a person enjoying his confidence since such a person would need to work with a fair amount of independence and make decisions on his own initiative so as to carry on the program of the agency. The incumbent would also be the person who would represent him officially in all the official acts in the Aguadilla region. (Appendix B p. 20a)

It was determined that in his capacity as Regional Director the plaintiff was responsible for implementing the various departmental programs in the region, adopting those measures and regulations necessary to such effect. In addition, it was determined that the plaintiff was the representative of the Secretary of Commerce in the region with the power to enforce those policies adopted at central departmental level. (Appendix B p. 19a)

When the new Personnel Act of 1975, supra, was approved, the position occupied by Ramos Villanueva was again included as a position of trust in the Department. Such classification was accepted by the Office of Personnel through a September, 1976, Memorandum to the Secretary of Commerce making the corresponding reassignment of the position from one in the Non-Competitive Service to a Position of Trust, effective the first day of October, 1976.

Following a change in the government administration Ramos Villanueva received a letter dated February 3, 1977, notifying of a dismissal from a position essentially confidential. (Appendix B p. 20a)

The trial court found that plaintiff's dismissal was due to his political affiliation and concluded that there was no evidence whatsoever as to establish that the plaintiff was not a person with the capacity and ability needed to discharge the position he used to occupy. The Trial Court also indicated that there was no proof whatsoever showing that Ramos Villanueva's affiliation, different from the party in power, created or could create problems of any kind in the implementation of government programs in that Department. To support this conclusion the trial court indicated that the Agency's Director of Personnel, Ana Julia Fernandez, stated that she had no knowledge that the political affiliation of the incumbent in the position had any impact whatsoever or in way was essential to the development of the agency's programs. (Appendix B p. 21a)

The Court also decided that defendant's (Secretary of Commerce) own evidence showed that the position of Regional Director for the Regions of Guayama and Fajardo were classi-

fied within the Career Service, and that this situation did not create any problems whatsoever in the development of the programs of the Department for those regions. Thus, the Trial Court concluded that the classification of the position of Regional Director of the Aguadilla Region as a position of trust is due to a functional and administrative convenience of the Department rather than to an imperative need in matters of absolute freedom necessary in the selection of the incumbent for the position and thus applied the doctrine of *Branti* v. *Finkel*.[3] (Appendix B pp. 22a)

B. Initiation Of Petition For Review

On April 3, 1981 the Secretary of Commerce of Puerto Rico initiated a Petition for Review to the Honorable Supreme Court of Puerto Rico contending that the trial court erred in issuing finding of facts openly in conflict with the evidence presented; declaring valid the complaint, in open contradiction with the Personnel Act and legal doctrines prevailing in Puerto Rico, and erroneously applying to the facts of the case the doctrine set forth in *Branti* v. *Finkel*, supra.

On March 31, 1982 the Supreme Court of Puerto Rico denied the Petition for Review and issued an Opinion and Judgment. In summary, the Supreme Court of Puerto Rico believes that the factual circumstances of the case revealed a dismissal for political motives and thus, the First Ammend came into play applying the doctrine of *Branti* v. *Finkel*, supra. The Supreme Court of Puerto Rico concluded that the appointing authority failed to present "evidence to show that the employee's particular political affiliation is an 'appropriate' requirements for the effective discharge of the public office in question. . ." (Appendix A p. 1a)

On April 30, 1982 the Secretary of Commerce filed a timely Motion of Rehearing, essentially arguing the existence of man-

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[3] This findings of facts, which are patently erroneous, will be discussed later on.

ifest error in the finding of facts by the Supreme Court of Puerto Rico in view of the evidence presented. This Motion was denied on May 13, 1982. (Appendix C p. 25a)

C. How The Federal Question Was Raised

Plaintiff Ramos Villanueva alleged in his complaint that his dismissal was an arbitrary one, with clear political motivations, without due process, and in violation of the constitutional principles that forbid political discrimination. The Trial Court decided that the dismissal was due to political affiliation and applied the case of *Branti* v. *Finkel*, supra, where the First and Fourteenth Amendment of the Constitution of the United States are brought into play. The Honorable Supreme Court of Puerto Rico issued an Opinion and Judgment whereby it concludes that the dismissal is null in view of Brenti v. Finkel, supra, and the First Amendment rights. (Appendix A pp. 1a-18a)

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The peculiar and improper interpretation made by the Honorable Supreme Court of Puerto Rico of *Branti* v. *Finkel*, supra, results in the abrogation of sec. 5.10 of the Puerto Rico Public Personnel Act, thus invalidating a state statute on federal grounds.
2. The Decision of the Honorable Supreme Court of Puerto Rico deprives the Government of Puerto Rico of having the public service personnel needed to implement the public policy which the electorate favored at the polls.

Ramos Villanueva was appointed Regional Director in the Department of Commerce under the provisions of the Personnel Act Number 345, supra. Said Law divided the positions in three (3) groups or subdivisions: (1) Exempted Service, (2) Non-Competitive Service, and (3) Competitive Service. (Appendix E p. 28a-33a)

His position was included in the Non-Competitive Service under the previous Personnel Act in accordance with Article 8(b) (2) which included the positions of "no more than fifteen

(15) officials and/or employees of each agency whose functions are of the normative, specialized, advisory, or trust type." (3 LPRA sec. 648 (b)(2), Appendix E p. 31a)

In accordance with the new Public Service Personnel Act, Public Law Number 5, supra, only two categories of employees are recognized: career service and confidential or trust category.

The plaintiff at the time of his appointment held a position in the Non-Competitive Service which was unaltered in consonance with Article 9 of the new Personnel Act (3 LPRA sec. 1421, Appendix G pp. 35a-37a) and was thus, at the time of dismissal classified as a confidential employee.

This last type is defined as ". . . employees . . . that intervene or collaborate substantially in the formulations of public policy, who advise directly or render direct services to the head of the agency . . ." and expressly includes regionals directors of agencies within the confidential service, providing that said positions of trust, or confidentials employees shall be freely selected and removed. (Sec. 5.10, (3 L.P.R.A., sec. 1350, Appendix E pp. 28a-33a)

This section of the law specifically creates a category of employees whose type of work, in order to be effectively discharge, require that the incumbent be of a particular party affiliation. Said classification, therefore, implies that the incumbent occupies said position at the will of the appointing authority.

Section 5.10 of Public Act Number 5 supra, thus implies a priori the condition that such confidential employee must belong to the same party as the appointing authority in order to function effectively. Thus the nature of the confidential employee inevitably excludes political non-conformity.

To that effect the Honorable Supreme Court of Puerto Rico in the case of *T. D. Pierson Muller II* v. *Feijoo* stated:

> "The reason why our legislation on public service personnel has acknowledged the existence and the need for

confidential personnel 'of free selection and removal; can be found in the essential selective nature of a government system which has the responsibilty of carrying out programs, normative plans, and the public policy that has won the majority's approval in the ballots . . .

[5]The changes in the administration supervened after the General Elections shall necessarily affect those positions whose holders implement public policy, or perform normative or confidential functions, inasmuch as they cannot mediatize the will of the people expressed in the ballots in favor of certain government programs and electing new administrators. The Constitution of the Commonwealth cannot tolerate any obstacle to the legal exercise of the power that stems from the people's sovereignty. In its Preamble, it declares that the will of the people is the source of public power; this principle is reiterated in Art. I, Sec. 1, stating that political power of the State emanates from the people and shall be exercised in accordance with their will; and in Sec. 2, stating that the Legislative, Executive and Judicial powers are subordinated to the sovereignty of the people; and affirming the value and effectiveness of the vote in Sec. 2 of the Bill of Rights (Const. Art. I, Sec. 2) when it provides that: 'The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise.

[6-7] Electoral franchise would be meaningless if the men elected to govern were not able to give effectiveness to the vote casted. The popularity acquired by this fundamental principle of the democratic regime is an excellent reminder for the so-called confidential employees that the vote's effective value precludes them from the expectation of continuity and from all possible property interest in such sensitive positions. Individual aspiration are transcended by the supreme action of the democratic assertion, circumstance which becomes manifest in the Report of the Commission on the Bill of Rights of the Constitution Convention, subscribed by its President, . . .[4] Appendix H p. 43a, 44a-45a)

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[4] It is curious to note that the decision of the Honorable Supreme Court of Puerto Rico, in the case at bar, creates an anomalous

Finally, it is inevitable for us to echo the expressions issued by Honorable Associate Justice Diaz Cruz in his Dissident Opinion, which summarizes our position, when he states:

> "The head or administrator of the government agency has the mission and duty of carrying out a program and of enforcing a public policy in the most efficient manner. His immediate aides must be identified with this public undertaking because they are responsible of the normative orientation of the same; that is why they must be subject to free selection and removal by the head of the agency. The duration of their employment is determined by the confidence the head of the agency has on their fitness and loyalty to carry out the governmental task. The confidential employee cannot raise his freedom of speech or of belief in order to retain his position as a dissenter because this would weaken the State's overriding interest in that the men called upon to govern may channel its program with utmost efficacy. If in the opinion of the Head of the Department the confidential employee's political affiliation places him on a plane of ideological incompatibility with the rules and purposes of the administrator, the latter shall always be completely free to do without his services. If the Head must answer to the People for his administrative undertaking, part of his commitment is to prevent that ideological dissenters hold-

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situation in the administration of personnel in public service, since the doctrine established is contrary to the one prevalent up to that time, as regards the area indicated. Its practical effect is that officials appointed to positions of trust, who belonged to a political ideology different from that of the incoming Administration, are placed in an advantageous position in relation to those also in positions of trust—who are politically allied to the new government. The former could remain in their positions unless it is shown that the matter of their political affiliation is an appropriate and necessary factor for the performance of their functions. The latter would always be subject to the appointing authority's absolute discretion, since they cannot invoke the political discrimination element available to the former group.

ing sensitive decision-making positions obstruct or defeat the same. Generally, ideas on government plans and programs form the contents of the person's political affiliation, specially within the partisan tradition of the democratic regime; that is why the license conferred by the overriding public interest in confidential employee matters cannot be restricted by the individual's protection against discrimination provided by our Constitution. . . . The majority has engendered a mistaken concept of the merit principle, a government or administration institution whose service is shunned by the best ones, and that if it attracts some of the ill-informed, they shall find themselves heading an agency with an unremovable confidential personnel. The new administration's absolute impossibility of operating with agency heads and other high ranking confidential personnel, affiliated to the adversary, defeated in the elections, is a widely known and notorious fact which can be plainly seen right now in our political panorama. The overriding public interest in the organization of government and in efficient administration is patent in our milieu: *we need no witnesses to prove it; neither Branti* v. *Finkel, nor the First Amendment lead to this devastating result; nor would the Federal Supreme Court place an employee's stubborness over the value and efficacy of suffrage.*" (Emphasis supplied) (Appendix A pp. 13a, 15a)

Lastly, it must be pointed out that in our American Democratic system the Executive and Legislative powers are derived from the political mandate given at the ballot box every four (4) years, through the electoral mechanism process, and according to the political thinkers they are the political powers of the State. It is inherent to the Executive power to be able to count on having various positions of trust, trust in the sense of being politically trustworthy. The Executive power is the one that has to determine those positions within each Government Department which shall be classified as strictly positions of trust, precisely because of their inherent functions of assistance to the Department heads and the Governor in the formulation of public policy, counseling and planning. *The text of the actual Personnel Act specifically includes as positions of trust the Regional Directors of the agencies (3 L.P.R. A1350*

(4) (Emphasis ours). It must be remembered that the Puerto Rican Legislature precisely through the Personnel Act in effect, as well as in the previous Personnel Act, supra, left it to the discretion of the Executive Branch the determination of which twenty-five positions under the present Act, and fifteen positions of trust should be in each Department or Agency of the Commonwealth of Puerto Rico.[5]

Previously, the Commonwealth Judicial power, regarding another Department of equal rank as the Department of Commerce, determined, on the contrary, that Regional Directors are indeed positions of political trust employees (*Diaz Gonzalez* v. *Tribunal Superior*, not reported, Appendix I pp. 48a-68a)

The effect of the final decision of the Honorable Supreme Court of Puerto Rico in this case would be that of circumscribing the positions of trust in the Department only and exclusively to the level of the Office of the Secretary of each Department. This would practically nullify our Personnel Administration legislation now in effect in all of the Commonwealth of Puerto Rico. It behooves to reiterate that the legislation has been validated precisely by our Honorable Supreme Court, through several of its own decisions which have been already discussed.

3. The Supreme Court of Puerto Rico improperly applied the doctrine set forth in *Branti* v. *Finkel*, supra.

This Honorable Court, in the above cited case, found that respondents *Branti* v. *Finkel* as assistants public defenders had " 'very limited, if any, responsibility' with respect to the overall operation of the public defender's office. They did not

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[5] It must be noted that the Honorable Supreme Court of Puerto Rico in its Opinion and Judgment, Appendix A pp. 1a-7a does not declare the referred statute unconstitutional nor determines that the Executive Power exercise an abuse of discretion in the application of said statute.

'act as advisors or formulate plans for the implementation of the broad goals of the office' and, although they made decisions in the context of specific cases, 'they do not make decisions about the orientation and operation of the office in which they work.' 457 F. Supp. at 1291. . . . they did not occupy any confidential relationship to the policy making process and did not have access to confidential documents that influenced policymaking deliberations. Rather the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy." (48 L.W. 4332)

In the light of those factual findings this Honorable Court found that this employees were neither policymaking nor confidential and thus, their political affiliation did not interfere with their discharge of public responsibilities, so that their rights under the First Amendment did not yield in the face of the interest of the state in maintaining governmental efficiency and effectiveness.

The case proceeds to offer three factors to be considered in the determination of whether an incumbent of a public office is or is not protected against political discrimination. First a determination has to be made as to who does that public official primarily answers to. Is his responsibility towards the Government? Is it towards the public in general? Is he expected to act with independence of criteria or trace some standards of the appointing authority? The second factor is the source wherefrom the confidentialty of his work originates. Does it originate in the ordinary course of his work or is said confidentiality accessible to him via the appointing authority? As a third factor the question is: Is he or he is not implementing the political platform of a political-partisan group?

Thus, in conformance with the doctrine set forth in the case of *Branti* v. *Finkel*, supra, the particular facts of each case must be taken into consideration in order to determine

whether the constitutional protections of the First and Fourteenth Amendment protect an employee against political discrimination.

In the case at bar the basis expressed by the then Secretary of Commerce, Mr. Damian Folch, for changing the position of the plaintiff to the Non-Competitive Service turns out to be of particular interest for the case at hand. To such effect, the Secretary alleged that the incumbent of the same should be a person enjoying his entire confidence, since he would have to make decisions on his own initiative for the purpose of implementing and giving continuity to the mission that he, as Secretary, had been given by the Government in power; and that in addition, he would represent him as Secretary of Commerce. (Appendix J p. 69a-70a).

It should also be noted, that in conformance with the finding of facts adopted by the Supreme Court of Puerto Rico in its Opinion, Mr. Ramos Villanueva had within his duties and responsibilities that of advising the Assistant Secretary of Commerce, the implementation of public policy of said Department in the Aguadilla Region, ascertaining that the objectives of the Department of Commerce were met in that Region, determining the personnel needs of said Department, and the representation of the Commerce Program in said Region (Appendix A pp. 1a-18a)

Therefore, the functions to be performed by the Regional Director of Aguadilla are clearly ones of the Normative, Specialized, Advisory, and Position of Trust type.

Also noteworthy, is the fact that the Trust Plan approved by the Personnel Office of Puerto Rico under the previous administration, as well as in the one finally approved by the present Director of said office, made all the Regional Directors of the Department of Commerce positions of trust.

We hold that there was evidence to the effect that the political affiliation of the plaintiff was an appropriate requirement for the effective discharge of the public office involved.

As first factor a determination has to be made as to whom Mr. Ramos Villanueva answered. According to the facts of the case at bar, the incumbent in the position of Director of a Regional Office was a person enjoying the full confidence of the Secretary, since he constituted the "Alter Ego" of the Secretary in a particular Region. Said official was expected to trace the norms implemented by the Secretary.

To such effect, the Honorable Supreme Court of Puerto Rico in an expressed and categorical manner has indicated that the Regional Directors as sub-heads of the Department constitute the "Alter-Ego" of the Secretaries in each region of the country, due to its policy-making and trust nature and that they are under the discretion and whim of the appointing authority in their selection or dismissal. *Diaz Gonzalez* v. *The Superior Court*, supra, and finally asserts that:

> "It should be clear that policy-making officers of the executive and of the majority in the legislature should have, when considering the problem of the country, a government philosophy, and attitudes consistent with—and not contrary to—those of the government elected by the people and under which they serve." (Appendix I p. 54a)

As a second factor to be considered, it is important to determine what is the source of the confidentiality of the work that plaintiff performed as Regional Director. His functions included advising and implementing the public policy of the Department, the coordination of activities with other governmental agencies, and the representation of said program by express delegation. With this in mind it must be categorically concluded that it was through the appointing authority, the Secretary of Commerce, that the confidentiality of work plaintiff performs was nurtured. (Appendix B p. 19a)

As a third factor, one has to consider whether Regional Directors contribute to the implementation of the political platform of a political group. There is no doubt that being said official the sub-heads of a Department, they would enervate the efficiency and the effectiveness of a Government, in the

implementation of the political platform, that by means of the mandate of the people, it was constitutionally elected to carry it out.

The letter of Mr. Damian Folch, Secretary of Commerce, under the Popular Democratic Party to which the plaintiff belongs, gave the reasons which cause the change of said Position to one of Trust consigning once again the character of confidentiality of said office. (Appendix J p. 69a-70a)

It seems unavoidable to conclude, in conformance with the preceding analysis, that the political affiliation of a Regional Director is an appropriate requirement for the effective discharge of the public office involved. As a consequence, the incumbent of said public office is not protected against political discrimination under the provisions of Amendments I and XIV of the Constitution of the United States.

The political affiliation, as a defining ingredient of the trust position, has been sanctioned by the First Circuit Court of Appeals in a case originated in the Federal District Court of Puerto Rico. In *Alfaro de Quevedo* v. *de Jesus Schuck*, 556 F.2d 591 (1977), said Court of Appeals held that said criterion can be validly used in the appointment and dismissal of officials who intervene in the formulation of public policy; even though the office the plaintiff headed is a third level one in the organization's hierarchy. It involved the Criminal Justice Division of the Department of Justice.[6] It is important to observe

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[6] This Division gave advice to the Secretary of Justice, the Under Secretary and the Assistant Secretary of Justice concerning substantive and procedural penal law. Besides the aforementioned, it was in charge of analysing all the proposed bills submitted by legislators related to penal matters; the preparation of bills at the request of the Governor (through the Secretary) or the Secretary of Justice, with regard to criminal justice; and of continuously carrying out specialized studies in this field.

that said work unit does not compare with the position of Regional Directors of a Department who has in a representative capacity of the head of the agency or who is the "*alter ego*" of such an Agency head.

Notwithstanding the aforementioned, said Federal forum categorically expressed on page 592, and quoting *Elrod* v. *Burns*, 427 U.S. 347 (1976):

> " '*Even so, policy-makers may be dismissed, consistently with the Constitution, on partisans grounds. This is not because policy-makers lack first amendment rights. Rather, it is because the first amendment interests in such cases are outweighed by 'the need for political loyalty of employees* . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate'. (Emphasis supplied)
>
> On the other hand, a new administration should not be forced to rely on admirers of opposing political views."

Upon ruling against the pretensions of the plaintiff, the Court of Appeals concludes by saying:

> "The Secretary was entitled to a person in plaintiff's position *who would enthusiastically pursue the policies of new administration.*" (Emphasis supplied)

IV—The decision of the Supreme Court of Puerto Rico is patently erroneous since its finding of facts are openly in conflicts with the evidence presented and thus, misapplies the case of *Branti* v. *Finkel*.

The Supreme Court of Puerto Rico found that the factual circumstances of the case at bar revealed a dismissal for political motives and it applied the doctrine of *Branti* v. *Finkel* supra. It concluded that the appointing authority failed to present "any proof showing" that the political affiliation of Ramos Villanueva was the appropriate requirement for the effective discharge of the position of Regional Director (Appendix A p. 2a-3a).

There are two theories on which the Honorable Supreme Court of Puerto Rico relies in order to arrive at the referred conclusion.

In the first place it indicates that the record shows that the hiring authority did not bring any evidence to demonstrate that the political affiliation of Ramos Villanueva was an appropriate requirement for the effective discharge of such office, but on the contrary, the Agency's Personnel Director stated that she "did not know that the incumbent's political affiliation had any impact whatsoever or was in any way essential for the development of the agency's programs." In that way, the Honorable Supreme Court of Puerto Rico adopted as its own finding of fact, of the Judgment rendered by the Trial Court which, is openly in conflict with the evidence presented. (Appendix A pp. 1a-6a).

Documentary evidence, other findings of facts, as well as a careful look into the transcript of the testimony of Mrs. Ana Julia Fernandez completely lessens the value of the above statement and reveals the essentially confidential nature of Villanueva's position.

Excerpt from pages 79a-80a, 81a, 82a-83a of Ana Julia Fernandez's testimony read as follows: (Appendix K)

"ALDARONDO, ESQ.:

Q. How many Regional Directors does the Department of Commerce have?

A. There are nine Regional Directors.

Q. As Personnel Officer, under what services are the Regional Directors on the Department of Commerce included?

A. They are included the nine of them, the nine positions are included within the confidential service.

Q. Why are said positions within the confidential service?

A. Beause the contention is that the Regional Directors *represent the Secretary of Commerce in each one of the regions. They end up being like mini Secretaries of Commerce in each region.* And . . . in addition to that, well, *they are the persons that have the responsibility of implementing the public policy of the De-*

partment of Commerce in relation to the services rendered to the business community. (Emphasis supplied)

. . .

Q. In what way is it represented, you testified a few moments ago that the Regional Directors were secretaries, in what way, if any, is it that they delegate that representation responsibility of the Secretary in their person?

A. Well, in the instrumentation of public policy and in the services to be rendered to the commercial and industrial sectors in terms of direct service.

Q. Based on your experience in the personnel area, could you tell us if for the position of Regional Director there is a need for a person of similar political affiliation to that of the Secretary of the Department of Commerce and why?

A. I believe that if a Regional Director, based on the practice, should indeed have *the same political affiliation as the Secretary of Commerce because he is the person that in thinking has to be compatible in terms of the implementation of public policy.* He represents the Secretary of Commerce in his region, who on occasions *has to assume the representation of the Governor."* (Emphasis supplied)

Mrs. Fernandez reiterates her position, when being questioned by the lawyer of Ramos Villanueva, she points out on page 117a:

Q. Uh, you stated Mrs. Fernandez that even though you deal with personnel, that you believe, that in your opinion these nine positions should have also been from the same party as the Secretary of Commerce, of the same political party because he is the one who represents him over here?

A. That is a, that is a very personal interpretation of mine.

Likewise, she sustains her position when on pages 119-120a she points out to the Trial Judge:

Q. "Very well, madam, I have some small doubts and since I am the one to settle this at the end, you will excuse me for asking a couple of questions, the first is the following: you stated that the day . . . something of November, November 30th, '76 the Act came into effect, according to your interpretation, the Act entered in 'propio vigore' classified the employees, the new classification establishes career and confidential, you state that in your opinion the Regional Directors should be of the same political affiliation as the head of the Department.

A. They should be."

The above quotations weaken, without doubt, the finding of facts object of this discussion.

Besides it is our contention that there was a lot more than any evidence where there arises that the political affiliation of the incumbent of that position was an indispensable requirement for that particular position.

The Trial Court in its own findings of fact revealed the essential nature of the trust position of the appellee. It indicated that the Ramos Villanueva, as Regional Director, was responsible for enforcing the various departmental programs through the adoption of the necessary interagency measures and regulations. That he was the representative of the Secretary of Commerce in the Aguadilla region and had the authority to enforce the policy of the Department. That in his capacity as Regional Director, the plaintiff exercised eminently executive functions. (Appendix B, p. 19a)

In addition, plaintiffs' position was, since the beginning, included within the Non-Competitive Service in tune with sec. 8(b)(2) of the Old Personnel Act, supra. (Appendix E, pp. 31a-32a)

No less important to the previous evidence is the letter sent by the Former Secretary of Commerce, Mr. Folch, to Milagros Guzman, Director of the Office of Personnel, which insofar as pertinente reads:

"As of that same date, I will include in the Non-Competitive Service position No. 236 of the Executive Director I assigned to the Aguadilla Regional Office. This position, whose functional title is Regional Director, was created on July 1, 1972 and since then, it has remained in the Competitive Service. This action is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, the Aguadilla Regional Office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given by law. In his capacity, he represents me as Secretary of Commerce, while he also represents our Government." (Appendix J, pp. A-74)

Nevertheless, the Supreme Court of Puerto Rico understood that the appellants gave inordinate value to such letter. (Appendix A, 69a-70a)

In our judgment, in no way, has there been an attempt to give a disproportionate value to the referred document. This document is explicit and clear and should be given its fair evidential value, particularly, when it is seen together with the documentary and attesting evidence supplied.

The Supreme Court of Puerto Rico understands that from the content of the same it can be gathered the person occupying the position should have the Secretary's confidence; and that he would have to make decisions on his own initiative, in order to implement the Law; (Appendix A, pp. 3a-4a).

It is thus evident that said document contributes evidence in favor of the State thesis that the political affiliation of the employee was a fundamental requirement for the adequate discharge of the functions of the position in question.

The statement made by Mr. Folch, in the above mentioned letter, referring to "our Government" make us inevitably infer that the position requires a person having the same ideology as that of the Government in power, so that the popular will can be enforced, making it possible to carry out the Government program which the electorate favored through its right to vote.

Again, it is imperative to recall the case of *Diaz Gonzalez* v. *The Superior Court*, supra. (Appendix I, p. 52a) where the Honorable Supreme Court of Puerto Rico expressed in a categoric manner that Regional Directors are the "alter-ego" of the Heads of the Departments and as such they are stricly confidential.

The second theory on which the Supreme Court of Puerto Rico relies is that the testimony of Ana Julia Fernandez[7] was corroborated by the evidence brought by the government in the sense that analogous offices—those of Guayama and Fajardo regional directors—are classified within the *career service* and that situation has not caused any problems whatsoever in the development of the Department's programs . . ." (Appendix A, p. 3a).

Again, this conclusion disregards the evidence presented.

If it is true indeed that from the testimony of Mrs. Fernandez it can be gathered that there were two Regional Director positions, to mention: the one at Fajardo and the one at Guayama, whose incumbents were within the Competitive Service; it is no less true, that the explanation for said situation was detailed and satisfactory, besides being supported by documentary evidence.

Mrs. Ana Julia Fernandez indicated, in what is pertinent, in pages 121a-123a (Appendix K).

> "A. When the first regions were created well it was San Juan, Ponce, Mayaguez and the last regions created were, the Guayama one and the Fajardo one and perhaps the one in Aguadilla also. When the creation of the position of Regional Director for Guayama and Fajardo was requested, it was explained to the Central Personnel Office, that it was a Regional Director and that he had the functions of the position, they had characteristics of confidential positions trust;

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[7] Testimony that does not adjust itself to the evidence.

but at that time *the previous Personnel Act was in effect, permitting only fifteen positions in the Non-Competitive Service* by virtue of Section 8-B2 of the old Personnel Act. At the time when the creation of the last two positions of Regional Director is requested, *the Department of Commerce had filled the fifteen positions in the Non-Competitive Service:* that is, the Central Personnel Office did not wish to create a position number sixteen and a position number seventeen in the Non-Competitive Service because it would have been a violation of the Act; and they then created it in the Competitive Service, a position clearly with characteristics of a confidential position, but in the Competitive Service.

Q. That is, that upon creating the Fajardo and Guayama regions there were fifteen confidential positions?

A. The positions had already been filled. That is the same thing that happens with the position for Aguadilla, that were created in the Competitive Service also.

Q. Then that raises another doubt in me, that is, then the Regional Directors of those two regions were less Regional Directors than the others, that is, they did not have the same representation of the Secretary and did not have the same powers?

A. They had the same functions.

Q. Very well. Then the other question. I understood from your testimony and according to what has been quoted, that the Act itself provides that all Regional Directors are confidential positions?

A. Yes, sir.

Q. Upon creating those two positions in the Competitive Service isn't there something then that. . .

A. Those positions are created in the Competitive Service prior to the new Act, those positions were created before '72.

Q. What is the Act that provides that all . . . before '75; that is, what is the Act that provides that all the division heads.

A. It is Act No. 5 of 1975, the new Personnel Act.

Q. Act No. 5 of '75, October?

A. Yes.

Q. The division heads no, the Regional Directors?

A. The Regional Directors. At the moment that those positions of Regional Directors are created, it was understood that they were confidential positions, what happens is that the Act did not provide a mechanism to include it in the Confidential Service because of the existing limitation that did not allow more than fifteen positions.

Q. That is, and at the date of that Act already the Guayama and Fajardo positions existed?

A. Yes, sir. . . ."

Summarizing, the witness explained that due to the fact that under provisions of Law 345, supra, only fifteen positions were allowed to be included in the Non-Competitive Service, the positions of Directors for these Regions had not been able to be included within the positions of trust existing in the Department of Commerce.

This is corroborated by a letter sent to Milagros Guzman, Director of Personnel from Secretary Damian Folch (Appendix J, pp. 69a-70a), where there arises that due to a resignation tendered in one of the positions included in the Non-Competitive Service under section 8(b)(2), supra, the position of Executive Director I assigned to the Aguadilla Regional Office (in this case the position that the appellee was going to occupy) was included in the Non-Competitive Service.

Now then, the witness immediately continued to explain that upon entering into effect the new Personnel Act and in conformance with Article 9 of said Law, supra, the official occupying said positions, the Regional Director for Guayama and Fajardo although they kept their career employees'

status,[8] their positions were converted into positions of trust and so they were removed to a position in the career service.

On the other hand, it is important to note that under the New Personnel Act the positons of trust which the Department of Commerce would be entitled to, would be twenty-five (25) and that is the reason why then all Regional Directors could be included in a confidential position.

We understand that the explanation given by the witness, in addition to the documentary evidence offered, clearly established the reasons why said incumbents belonged to the career service, even though their functions and duties were those of a position of trust.

The Supreme Court of Puerto Rico assumed that if these two employees, who were in the Competitive Service did not cause any problems in the development of the Department programs it could be concluded that the office of Regional Director did not require the incumbent to be a person having the confidence of the appointing authority. (Appendix A, p. 3a)

It arises from the testimony of Ana Julia Fernandez that the positions of Regional Directors were created in 1972, when the Popular Democratic Party was in power. From the documentary evidence there arises that the Regional Directors of Guayama and Fajardo were appointed prior to the elections of 1976. The appointing authority had to fill those positions, no positions in the Non-Competitive Service were available and thus fills them with persons of his confidence, but in the only position available the Competitive Service. The same appointing authority, upon entering into effect the New Personnel

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[8] It must be noted that said positions were positions in the Competitive Service and thus, when the New Personnel Act enters into effect its incumbents were considered career employees. (Art. 9, supra) (Appendix G, pp. 35a-37a).

Act, supra, makes this position one of trust, benefitting from the fact that the law now authorized twenty-five (25) positions of trust.

At the onset of the electoral change in 1976 the Regional Directors of Fajardo and Guayama under the Popular Democratic Party government were installed in other positions. Their position's once vacant became trust positions by virture of Art. 9, supra, and their incumbents enjoyed the confidence of the new appointing authority, the present Secretary of Commerce, Honorable Juan H. Cintron.

We do not see any reason why the Regional Directors of the positions for Guayama and Fajardo could have caused any problems during the time they enjoyed their positions as Regional Directors, since they did so during a period of time in which they enjoyed the confidence of the then appointing authority. When said authority changed they, enjoying a career employee status, were reinstalled in other positions having their positions as Regional Directors vacant for the new appointing authority.

CONCLUSION

For these reasons: 1) a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the Commonwealth of Puerto Rico and 2) the Opinion and Judgment of the Supreme Court of the Commonwealth of Puerto Rico in this case should be revoked or reversed by the Supreme Court of the United States of America.

Respectfully submitted,

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APPENDIX A
(TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

No. R-81-137

ARTURO RAMOS VILLANUEVA,
Plaintiff and appellee,

v.

JUAN CINTRON, SECRETARY OF COMMERCE, etc.,
Defendants and appellants.

Review

MR. JUSTICE NEGRON GARCIA delivered the opionion of the Court.

San Juan, Puerto Rico, March 31, 1982

We affirm here the Superior Court's opinion which annulled, in the factual circumstances of the case at bar, an employee's dismissal for political reasons. Defendants-appellants' thesis that said dismissal is valid because appellee Ramos Villanueva's position—Director of the Aguadilla Region—was confidential and because he participated in the agency's policy-making, violates the basic guarantees of our Constitution, the First Amendment to the Federal Constitution, and the most recent federal case law. We shall explain ourselves.

I

The learned trial court found that Ramos Villanueva's dismissal was mainly due to his political affiliation. It then applied the rule laid down by the Federal Supreme Court in *Branti* v. *Finkel*, 445 U.S. 507 (1980), and concluded that the dismissal was null. Its decision was correct.

In *Branti*, which decision was based on the fundamental right to freedom of association,[1] the Federal Court deemed that "[i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate 'an overriding interest,' . . . 'of vital importance,' . . . requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." At 515. Citing *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Court acknowledged that partisan affiliation could be "an acceptable requirement for some types of government employment," and thus it concluded that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. . . ." Based on the foregoing, the Court concluded:

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; *rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.* P. 518 (underscore supplied).

From the foregoing statements we may reasonably conclude that the hiring auth rity (the government) must bring evidence to show that the employee's particular political affiliation is an "appropriate requirement" for the effective discharge of the public office in question; that is to say, the Government must establish the existence of government interests that rank above he employee's First Amendment rights.

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[1] The fundamental rights protected by the Federal Constitution and the case law rules that define their contents and scope, extend to Puerto Rico. *Pueblo* v. *Duarte*, 109 D.P.R. 596 (1980).

In the case at bar, the Government failed to establish this. The record shows that the hiring authority did not bring any evidence to demonstrate that the political affiliation of the employee appointed to the position held by Ramos Villanueva was an appropriate requirement for the effective discharge of such office. On the contrary, the agency's Personnel Director said that she "did not know that the incumbent's political affiliation had any impact whatsoever or was in any way essential for the development of the agency's programs." Her testimony was corroborated by the evidence brought by the Government in the sense that analogous offices—those of the Guayama and Fajardo regional directors—"are classified within the *career service* and this situation has not caused any problems whatsoever in the development of the Department's programs. . . ."

In order to overcome the negative impact of this reality, the appellants give inordinate value to a letter of June 23, 1973[2] whereby Damian Folch, the then Secretary of Commerce, informed Milagros Guzman, the Director of Personnel, that he was going to classify Ramos Villanueva's position in the "Non-Competitive Service." A careful analysis of its contents shows, at the most, that the author's view on this point was: (a) that the person who would hold the office should be within the

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[2] Insofar as pertinent, it reads:

"As of that same date, I will include in the Non-Competitive Service position No. 236 of the Executive Director I assigned to the Aguadilla Regional Office. This position, whose functional title is Regional Director, was created on July 1, 1972 and since then, it has remained in the Competitive Service. This action is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, the Aguadilla Regional office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given by law. In his capacity, he represents me as Secretary of Commerce, while he also *represents our Government.*"

Secretary's confidence; and (b) that he "[should] have to make decisions on his own initiative" in order to implement the law, that is to say, he would somehow be a policymaker. Unless we infer that the expression that this officer ". . . represents me as Secretary of Commerce, while he also represents our Government," embodies, includes and expounds a claim for strict partisan affiliation, there is no evidence to support the Government's thesis. This notwithstanding, as we have said above, we would have to reject, with no apparent reason, the direct and uncontroverted testimony of the Director of Personnel in the sense that the incumbent's political affiliation did not have "any impact whatsoever or was in any way essential for the development of the agency's programs." In other words, the record does not favor the following questions: Is a particular political affiliation necessary for the faithful discharge of the office? Are there overriding government interests to justify the encroachment upon the incumbent's constitutional rights? We repeat that the evidence brought by the Government only allows us to answer these questions in the negative.

II

Once these points of the evidence have been clarified, it is easy to see that the hiring authority's action constitutes an undue intrusion on Ramos Villanueva's right not to be discriminated against because of political beliefs, right which is enshrined in our Constitution. Art. II, Sec. 1; Art. II, Sec. 4; Art. II, Sec. 6; Art. II, Sec. 7.[3] There is no doubt as to the

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[3] All employees, even those who are confidential, enjoy a protection against discrimination for political beliefs. In *Baez Cancel* v. *Mayor Mun. of Guaynabo*, 100 P.R.R. 980, 985-986 (1972), we said:

"Section 1 of Art. II of the Constitution of Commonwealth of Puerto Rico prescibes in a clear manner that 'no discrimination shall be made on account of race, color . . . political or religious ideas.' The proscription of discrimination is clear and final. *Its test does not permit any distinction.* It means to say what it says. The State in any of its multiple functions or services shall not discriminate against a

substantial nature of this right—fundamental in a democratic form of government, and a corollary of dignity, respect, and equality before the law. Although it is not unlimited, it may, in certain circumstances, yield before high-ranking communitary interests—*Hermina Gonzalez* v. *Secretario del Trabajo*, 107 D.P.R. 667, 675 (1978); *E.L.A.* v. *Hermandad de Empleados*, 104 D.P.R. 436, 446 (1975); *Mari Bras* v. *Casanas*, 96 P.R.R. 15, 20 (1968)—and in the circumstances of the instant case—and subject to a strict judicial scrutiny, *Zachry International* v. *Tribunal Superior*, 104 D.P.R. 267 (1975); *Leon* v. *Torres*, 109 D.P.R. 804 (1980)—this right should prevail.

III

Finally, this decision does not pass on the validity per se of a confidential classification,[4] nor does it question the power of the hiring authority to, in such instances, do without the services of an incumbent without previous notice, preferment of charges, and hearing. *Diaz Gonzalez* v. *Tribunal Superior*, 102 D.P.R. 195, 197 (1974). Neither does it prejudge the possibility that in other cases of dismissals, attributable to political reasons, it may be lawfully detected and established—to the satisfaction of the Judicial Power—that the "political affiliation" requirement is expressly set forth or impliedly submerged and embodied in the previous classification, adopted through legislative, executive or administrative power upon creating an office under the *confidential* category.

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citizen because of the mere act that the latter is colored, an atheist, or on account of his political ideas. Any other construction would enervate its efficacy. To strengthen it and to weaken it is our duty, as the principal custodians of the Constitution."

[4] Please remember that the uncontroverted evidence established that the Guayama and Fajardo regional directors were classified as *career* employees whereas Ramos Villanueva's office was *confidential*. The least we can say is that this is an incongruity in the uniform and scientific implementation of the merit system.

Our decision simply means that the prevailing constitutional scheme recognizes and permits that, in certain circumstances, a particular politico-partisan affiliation may be validly required in order to obtain and keep a public office. However, in view of the excellency presupposed and sought by a personnel system based on merit, the minimum continuity and stability of the Government's operation—irrespectively of who has temporarily the People's mandate—and the democratic maturity and tolerance to which our Constitution aspires, it is reasonable to conclude that such cases constitute not the rule but the exception. Certainly, the case at bar cannot be placed within the singularity rule contemplated.

In view of the foregoing, in strict law and constitutional analysis, judgment shall be rendered affirming the decision of the Superior Court which annulled the dismissal.

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonson de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on March 31, 1982, in case No. R-81-137, *Arturo Ramos Villanueva* v. *Juan Cintron, Secretary of Commerce, etc.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 25th day of June 1982.

/s/ Lady Alfonso de Cumpiano
LADY ALFONSO DE CUMPIANO, Chief Clerk
Supreme Court of Puerto Rico

(TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

No. R-81-137

ARTURO RAMOS VILLANUEVA,
Plaintiff and appellee,

v.

JUAN CINTRON, SECRETARY OF COMMERCE, etc.,
Defendants and appellants.

Review

MR. JUSTICE DIAZ CRUZ, dissenting.

San Juan, Puerto Rico, March 31, 1982

The facts in this case—dismissal of an employee—are clearly and tersely expressed in the original findings, supplemented by additional findings of the Aguadilla Part, which we copy below:

> [Facts proved] On July 10, 1973 Mr. Antonio [*sic*] Ramos Villanueva was appointed Regional Director of the Domestic Commerce Program of the Department of Commerce, for the Aguadilla Region. At the date of the appointment, his position was within the non-competitive service.
>
> In such capacity, his duties were mainly of an executive nature. They included, among others: (a) to advise the Under-Secretary of the Domestic Commerce Program in matters related to the education and training of commerce personnel; (b) to plan, direct, supervise, and evaluate all technical and administrative activities related to commerce development programs in the region; (c) to establish working methods that facilitate the achievement of the program's goals; (d) to coordinate with other agencies; (e) to advise the Under-Secretary of the Domestic Commerce Program in its activities for the region.

This position was originally created within the competitive service. By request of the Secretary of Commerce to the Personnel Office, in June 1973, the position was transferred to the non-competitive service. The request was based on the fact that the incumbent should be a person within the confidence of the Secretary. He also stated that said person had to have certain independence and make decisions on his own in order to promote the agency's program.

When the new Personnel Act of 1975 was adopted, the position held by the plaintiff (now classified as Executive Director) was included among the confidential positions in the Department of Commerce. Said classification was accepted by the San Juan Personnel Office through a memorandum of the Secretary of Commerce, of September 28, 1976. The corresponding reappointment of the position from the non-competitive to the confidential service was made to be effective on October 1, 1976.

After the change in administration that took place on January 2, 1977, plaintiff received a letter—dated February 3, 1977—notifying him that he was being dismissed from his position because it was confidential, and that such dismissal would be effective on February 7, 1977.

A few days after plaintiff's dismissal, another person was appointed to his position.

The evidence brought convinces us and leaves no doubt as to the fact that plaintiff's dismissal and substitution was due mainly to his political affiliation. The plaintiff is fully identified with the Popular Democratic Party, which was defeated in the 1976 Election; his substitute is a person identified with the New Progressive Party, which won said Election.

At the time of the dismissal, plaintiff had been working for 16 years as a public servant and, on account of his merits and ability, he had been promoted from a position as Auxiliary Engineer in the Planning Board to Regional Director of the Department of Commerce. The defendant brought no evidence nor tried to establish that the plaintiff lacked the necessary capacity, knowledge, and abilities to discharge his office. Neither was there any evidence to show that his political affiliation—which was different from that of the party in power—created or could create

any kind of problems in the implementation of said department's government programs. Furthermore, the Agency's Director of Personnel stated that she did not know that the incumbent's political affiliation could have any impact whatsoever or would in any way be essential for the development of the agency's programs.

Besides, the defendants' evidence showed that the position of Regional Director for the Guayama and Fajardo regions are classified within the career service, and this situation has not created any kind of problems in the development of the Deparment's programs for said regions. From these facts we may well conclude that the classification of the office of Aguadilla Regional Director as confidential, though it is a valid classification in harmony with the present Law and Regulations, is rather the result of the Department's functional and administrative conveniences, and not a matter of urgent necessity where absolute freedom is required to select an incumbent for that position. It is convenient to mention that the Agency's head decides what positions are to be included within the confidential service. The Personnel Office must deal only with whether the classification conforms to the applicable statutes and Personnel Regulations.

[Additional findings of fact] At the time he was appointed Aguadilla Regional Director of the Department of Commerce, he held a probationary position as area coordinator teacher in the Department of Education, office which he held until the day before he was appointed Regional Director.

For the agencies' administrative convenience, his transfer from one agency to the other was made by resignation of his position at the Department of Education, and reappointment in the Department of Commerce, although the sick and vacation leaves accrued in the Department of Education were transferred to the other agency.

In his capacity as Regional Director of the Department of Commerce, the plaintiff was responsible for enforcing the different department programs for the region, adopting such intraregional measures and regulations as was necessary for such purpose.

The plaintiff was the representative of the Secretary of Commerce in the region, and he was empowered to en-

force such policies as were adopted at the central department level.

As it appears from the letter of the Secretary of Commerce to the Director of Personnel—sent on occasion of the change of status of the office of Regional Director from the competitive to the non-competitive service in June 1973—the Regional Director should have the personal confidence of the Secretary of Commerce because he officially represents the Secretary in all official activities in the region.

Based on these facts, the Superior Court concluded that the characteristic of free selection and removal attributed by the Personnel Act to confidential employees (3 L.P.R.A. § 1350) becomes ineffective vis-a-vis the clause against discrimination contained in the Constitution of 1952 (Art. II, Sec. 1), if the power to dismiss of the Head of the Agency is contaminated by discrimination. The only exception recognized by the Superior Court to the paralyzing action of the constitutional proscription of discrimination, was that given in *Branti* v. *Finkel*, 445 U.S. 507 (1980), when the employee's political affiliation is an essential condition to the discharge of particular duties of his office. When the Cabinet Secretary resorted to us, we noted that there was a conflict with our decision in *Pierson Muller II* v. *Feijoo*, 108 D.P.R. 261 (1978), and we issued the writ of review.

The Superior Court sought support for its decision in *Branti* v. *Finkel*, *supra*, despite the fact that the United States Supreme Court follows the rationale adopted by this Court in *Pierson Muller II*, upon stating: "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate 'an overriding interest' . . . 'of vital importance' . . . requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." And making reference to *Elrod* v. *Burns*, 427 U.S. 347, *Branti* states: ". . . party affiliation may be an accpetable requirement for

some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental *effectiveness* and *efficiency*. . . . In sum the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." (Underscore supplied.)

In *Pierson Muller II*, *supra*, we concluded that due to the fact that it stems from the collective will expressed by the vote of the majority, the right of the People's democratic majority to organize its Government has priority and preference over the confidential employee's right to retain his job regardless of his political beliefs. In the unavoidable clash produced by the incompatibility of interests protected by the political power clauses of the Constitution and this precept of individual protection against discrimination, we have decided that the individual interest must yield, recognizing the predominant public interest in administrative efficiency. The present conflictive situation is better-defined than that raised in *Sucesion Capella* v. *Iglesia Pentecostal*, 102 D.P.R. 20 (1974) between the right to privacy and the practice of religion, insofar as the individual rights affected therein turned around a limited orbit of space and persons, whereas plaintiff-appellee's claim has the dimension of submitting the compelling interest in the efficient implementation of the Government program, to his own particular convenience. " 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order. and the GENERAL WELFARE in a democratic society.' " Universal Declaration of Human Rights (Paris, Dec. 10, 1948) cited in *Hermina Gonzalez* v. *Srio. del Trabajo*, 107 D.P.R. 667, 675 (1978).

The head or administrator of the government agency has the mission and duty of carrying out a program and of enforcing a public policy in the most efficient manner. His immediate aides must be identified with this public undertaking because they are responsible of the normative orientation of the same; that is why they must be subject to free selection and removal by the head of the agency. The duration of their employment is determined by the confidence of the head of the agency has on their fitness and loyalty to carry out the governmental task. The confidential employee cannot raise his freedom of speech or of belief in order to retain his position as a dissenter because this would weaken the State's overriding interest in that the men called upon to govern may channel its program with utmost efficacy. If in the opinion of the Head of the Department the confidential employee's political affiliation places him on a plane of ideological incompatibility with the rules and purposes of the administrator, the latter shall always be completely free to do without his services. If the Head must answer to the People for his administrative undertaking, part of his commitment is to prevent that ideological dissenters holding sensitive decisionmaking positions obstruct or defeat the same. Generally, ideas on government plans and programs form the contents of the person's political affiliation, specially within the partisan tradition of the democratic regime; that is why the license conferred by the overriding public interest in confidential employee matters cannot be restricted by the individual's protection against discrimination provided by our Constitution. "Although there is no . . . justification for making party membership decisive in filling the ranks of lower government posts, the argument for allowing ideological criteria at levels of high policy significance seems sufficiently compelling withstand first amendment attack." Tribe, *American Constitutional Law* 706 (1978).

Insofar as this case deals with a confidential position whose incumbent participates in policymaking and in formulating government regulations, the facts herein are governed by the statement made in *Diaz Gonzalez* v. *Tribunal Superior*, 102

D.P.R. 195, 198 (1974), to the effect that Regional Directors are the *alter egos* of the Head of the Department and, as such, they are strictly confidential employees subject to free selection and removal. In its own findings of fact, the trial court reveals the essentially confidential nature of the appellee's position since the former Secretary of Commerce, Damian Folch, requested that he be thus classified in a letter to Milagros Guzman, Director of Personnel (June 25, 1973), whereby he notified her that he had changed the above-mentioned position from the competitive to the confidential service. The letter reads:

> "As of that same date, I will include in the Non-Competitive Service position No. 236 of the Executive Director I assigned to the Aguadilla Regional Office. This position, whose functional title is Regional Director, was created on July 1, 1972 and since then, it has remained in the Competitive Service.
>
> This action is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, the Aguadilla Regional office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given by law. In his capacity, he represents me as Secretary of Commerce, while he also represents our Government."

Such an explicit document gives no basis to the trier's observation that the confidential classification answered rather to administrative arrangements, and that he was not persuaded that the Regional Director's political affiliation—which was different from that of the party in power—would create any problems in the implementation of the government's program. However, the trial judge rectified this observation in the above-copied additional findings which define the appellee Regional Director's functions as normative, playing a critical role in the Department's policymaking.

The nature of appellee's confidential public office unavoidably excludes ideological dissent. The peculiar interpretation of

Branti v. *Finkel* made by the majority, results in the abrogation of two explicit mandates of the Personnel Act (No. 5 of October 14, 1975) whose art. 5.10, item 4, expressly includes regional directors of agencies within the confidential service, and whose item 8 provides that "[c]onfidential employees shall be of free selection and removal." Closely examined, this decision deprives the country of a public service offered by the best men and women who would never be able to organize their departments or agencies with confidential personnel imposed by those who hold steadfast to their chair in deliberate challenge to the electoral verdict; or through an injunction issued by a Court that protects this stubborness. No Democratic society can be governed without a limited number of confidential employees who intervene or collaborate in policymaking and in the normative implementation of government programs, and who directly advise or render services to the head of the agency. (Text of art. 5.10 cit. - 3 L.P.R.A. - § 1350.)

The sword this Court justifiedly wielded in favor of temporary municipal employees in *Baez Cancel* v. *Mayor Mun. of Guaynabo*, 100 P.R.R. 980 (1972), has become the battering ram for destroying the effectiveness of public administration. The majority has engendered a mistaken concept of the merit principle, a government or administration institution whose service is shunned by the best ones, and that if it attracts some of the ill-informed, they shall find themselves heading an agency with an unremovable confidential personnel. The new administration's absolute impossibility of operating with agency heads and other high ranking confidential personnel, affiliated to the adversary, defeated in the elections, is a widely known and notorious fact which can be plainly seen right now in our political panorama. The overriding public interest in the organization of government and in efficient administration is patent in our milieu; we need no witnesses to prove it; neither *Branti* v. *Finkel*, nor the Federal Supreme Court place an employee's stubborness over the value and efficacy of suffrage.

The majority brings *Baez Cancel* v. *Mayor Mun. of Guaynabo, supra*, trailing by the hair. Those protected by the

Court in that case were not Regional Directors, advisors, or immediate aides who intervened in government policymaking; they were foremen, payroll employees who belonged to the class of *the forsaken*, whose incumbency could in no way hinder the efficient administration of the municipality. There is quite a distance between them and the appellee Regional Director. This distance is highlighted by Folch's letter, *ante*, which defined the incumbent Regional Director—a confidential employee according to the Personnel Act and to *Diaz Gonzalez* v. *Tribunal Superior*, *supra*—as his representative, and as representative of the Government, when making independent decisions on his own in furtherance of the public mission of the Department of Commerce.

We would be inviting chaos if we were to abolish the "confidential employee" concept in our Personnel Act, which is inherent to the prohibition of removing political adversaries stuck in decisive policymaking positions because, although they may be honest, capable and efficient in their *confidential* positions, the only reason to deny them such confidence lies on their ideological discrepancy with the new chief.

Between the sociological interpretation—presently the most prestigious—and the literal abstract, the majority has chosen the latter, showing its support for *Branti*, *supra*, and in its rejection of Prof. L. Tribe. It is content with the predominance of a fiction: government heads shall continue picking up their confidential personnel and will separate from these positions those who disagree with the ideology whenever the latter—as it usually happens—is an obstacle to the loyal execution of the plans and programs that the People endorsed at the polls. Save for the fact that, in order not to contradict the majority of this Court, they will give no grounds for removal, leaving to the public opinion the discovery of whether there is a stigmatizing cause for an employee's dismissal such as fabrication, ineptness, indiscipline, etc. Until a confidential employee thus removed can gather all the evidence—always at hand in this type of cases—and fully shows, at an injunction hearing, that although his superior hid the true reason with the silence

of the Sphinx, such reason was one other than ideological discrepancy. And then judgment shall be rendered imposing on the head of the agency or department, as an advisor, consultant and right hand, the man who could have been his most ardent political adversary,[1] and condemning him to pay a compensation. Certainly a very nice way of sponsoring government efficiency and of paying respect to the will manifested at the polls. It is a well-known fact that, in Puerto Rico, absolutely *all* confidential employees who hold positions of policymaking, advising or collaborating with the chief's executive function, have the means for showing before the court that the only reason behind their dismissal was their ideological discrepancy with the new chief. The Personnel Act precept that these employees are of free selection and removal shall die a victim of ingenuity. The writ of injunction and the judgment for damages against the discriminating officer—now strengthened by *Acevedo Diaz* v. *Collazo, Srio. Servicios Sociales*, ... D.P.R. . . . . (82 J.T.S. 30)—shall abolish the statutory provision without which there can simply be no government. This situation reminds us of an old proverb; the road to hell is paved with good intentions. In such a time of storm, the utopical premise adopted today by this Court—good only for governing the Heavens—shall perish.

In view of the foregoing, I would reverse the judgment below.

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[1] After he has been put under oath, what other reason may the new chief adduce?

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on March 31, 1982, in case No. R-81-137, *Arturo Ramos Villanueva* v. *Juan Cintron, Secretary of Commerce, etc.*, (dissenting opinion), the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 28th day of June 1982.

Lady Alfonso de Cumpiano
LADY ALFONSO de CUMPIANO
Chief Clerk
Supreme Court of Puerto Rico

EXHIBIT I

APPENDIX B
(TRANSLATION)

IN THE SUPERIOR COURT OF PUERTO RICO
AGUADILLA PART

CIVIL NO. TS-77-642

Re: CIVIL ACTION

ARTURO RAMOS VILLANUEVA,
Plaintiff

v.

JUAN CINTRON, SECRETARY OF COMMERCE, etc.,
Defendant

OPINION

The established facts essential to the adjudication of this case are the following:

1. On July 10, 1973, Mr. Antonio Ramos Villanueva was appointed Regional Director of the Domestic Commerce Program of the Department of Commerce, for the Aguadilla Region. At the date of the appointment, his position was within the non-competitive service.

2. In such capacity, his duties were mainly of an executive nature. They included, among others: a) to advise the Under-Secretary of the Domestic Commerce Program in matters related to the education and training of commerce personnel; b) to plan, direct, supervise, and evaluate all technical and administrative activities related to commerce development programs in the region; c) to establish working methods that facilitate the achievement of the program's goals; d) to coordinate with other agencies; e) to adivse the Under-Secretary of the Domestic Commerce Program in its activities for the region.

3. This position was originally created within the competitive service. By request of the Secretary of Commerce to the Personnel Office, in June 1973, the position was transferred to the non-competitive service. The request was based on the fact that the incumbent should be a person within the confidence of the Secretary. He also stated that said person had to have certain independence and make decisions on his own in order to promote the agency's program.

4. When the new Personnel Act of 1975 was adopted, the position held by the plaintiff (now classified as Executive Director) was included among the confidential positions in the Department of Commerce. Said classification was accepted by the San Juan Personnel Office through a memorandum of the Secretary of Commerce, of September 28, 1976. The corresponding reappointment of the position from the non-competitive to the confidential service was made to be effective on October 1, 1976.

5. After the change in administration that took place on January 2, 1977, plaintiff received a letter—dated February 3, 1977—notifiying him that he was being dismissed from his position because it was confidential, and that such dismissal would be effective on February 7, 1977.

6. A few days after plaintiff's dismissal, another person was appointed to his position.

7. The evidence brought convinces us and leaves no doubt as to the fact that plaintiff's dismissal and substitution was due mainly to his political affiliation. The plaintiff is fully identified with the Popular Democratic Party, which was defeated in the 1976 Election; his substitute is a person identified with the New Progressive Party, which won said Election.

8. At the time of the dismissal, plaintiff had been working for 16 years as a public servant and, on account of his merits and ability, he had been promoted from a position as Auxiliary Engineer in the Planning Board to Regional Director of the Department of Commerce. The defendant brought no evidence nor tried to establish that the plaintiff lacked the necessary

capacity, knowledge, and abilities to discharge his office. Neither was there any evidence to show that his political affiliation—which was different from that of the party in power—created or could create any kind of problems in the implementation of said department's government programs. Furthermore, the Agency's Director of Personnel stated that she did not know that the incumbent's political affiliation could have any impact whatsoever or would in any way be essential for the development of the agency's programs.

9. Besides, the defendants' evidence showed that the position of Regional Director for the Guayama and Fajardo regions are classified within the career service, and this situation has not created any kind of problems in the development of the Department's programs of said regions. From these facts we may well conclude that the classification of the office of Aguadilla Regional Director as confidential, though it is a valid classification in harmony with the present law and Regulations, is rather the result of the Department's functional and administrative conveniences, and not a matter of urgent necessity where absolute freedom is required to select an incumbent for that position. It is convenient to mention that the Agency's head decides what positions are to be included within the confidential service. The Personnel Office must deal only with whether the classification conforms to the applicable statutes and Personnel Regulations.

CONCLUSIONS OF LAW

1. The Constitution of Puerto Rico proscribes all discrimination by reason of, among others, political ideas. Art. II, Sec. 1.

2. The Puerto Rico Public Service Personnel Act establishes the personnel classification: one for career positions, and the other for confidential positions. As to the latter, the Act provides that confidential personnel is of free selection and removal, subject to the discretion of the hiring authority. (3 L.P.R.A. 1349, 1350).

3. As an employee holding a confidential position, the plaintiff is subject to the provisions of the Act and the Regulations. However, neither the Act nor the Regulations may invalidate the constitutional bar against all kinds of discrimination. The constitutional mandate not only bans discrimination but also provides that "the laws . . . shall embody these principles of essential human equality." Hence, in this case, the Act cannot be construed as if it granted a power barred in the constitution: the power to make decisions in prejudice of a person standing under reasons of political discrimination.

4. The foregoing does not mean that the Act is constitutional because it authorizes the creation of positions of free selection and removal. Whenever possible, the law must be construed so as to safeguard its constitutionality. Thus we understand that the law authorizes the free selection and removal of confidential employees and that such selection and removal cannot be based on any type of discrimination. Personnel may be freely selected and removed for any incompatibility in questions of interpretation and application of rules, or for any difference of opinion regarding any aspect of the work, or for the mere reason that the person having the power to hire and remove personnel disliked the incumbent. Removal may even be made without any particular reason and the hiring authority is not bound to notify the employee dismissed.

But no one can be dismissed for reasons of discrimination in violation of the constitutional mandate.

5. There is only one exception to the rule against discrimination, recognized by the United States Supreme Court in *Branti* v. *Finkel*, judgment of March 31, 1980 (48 LW 38). Such exception comes into play when the employee's political affiliation is essential for the discharge of his office. But, as we stated above, no evidence was brought in this case to show this condition, although the very defendant brought evidence to show that said condition did not exist.

6. Bearing in mind the fact that the only established ground for plaintiff's dismissal was his affiliation to the Popular

Democratic Party, the said dismissal constitutes an act prompted by political discrimination in violation of the constitutional mandate. Hence, plaintiff is right in his claim and is entitled to full redress.

JUDGMENT

In view of the foregoing findings of fact and conclusions of law, we hereby find for the plaintiff and order the Secretary of Commerce to reinstate the plaintiff in the position as Aguadilla Regional Director, from which he was removed, to compensate him for back wages from the date of his dismissal, February 7, 1977, until his reinstatement, based on the salary schedule applicable to his position from time to time, plus the corresponding fringe benefits such as payment of annual leave, contributions to the Retirement Fund and Social Security, Christmas Bonus, and others.

The Defendant is ordered to pay costs, but not attorney's fees.

To be Entered and Notified.

Given on September 24, 1980.

Signed in Aguadilla, Puerto Rico, this 22nd day of January 1981.

(sgd) Aladino Torres Rivera
ALADINO TORRES RIVERA
Superior Court Judge

I Certify:
DANIEL BADILLO BELLO
Clerk

CHIEF CLERK'S CERTIFICATE

I Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed documents are photocopies of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the following documents which are part of the record in case No. R-81-137, *Ramos Villanueva* v. *Department of Commerce*, before this Court:

1) Letter dated June 25, 1973.

2) Letter dated February 3, 1977.

3) Opinion of the Superior Court of Puerto Rico, Aguadilla Part.

IN WITNESS WHEREOF, at the request of the Department of Justice of Puerto Rico, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 12th day of July 1982.

Lady Alfonso de Cumpiano
LADY ALFONSO de CUMPIANO
Chief Clerk
Supreme Court of Puerto Rico

APPENDIX C
(TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

NO. R-81-137 Review

ARTURO RAMOS VILLANUEVA,
Plaintiff and appellee

v.

JUAN CINTRON, SECRETARY OF COMMERCE, etc.,
Defendants and appellants

RESOLUTION

San Juan, Puerto Rico, May 13, 1982

The motion for reconsideration is hereby denied.

It was so agreed by the Court and certified by the Clerk. Mr. Justice Diaz Cruz would have reconsidered it. Mr. Justice Irizarry Yunque took no part in this decision.

(s) Lady Alfonso de Cumpiano
LADY ALFONSO de CUMPIANO
Chief Clerk

APPENDIX D

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

§ 648.—Divisions of service

(a) *Exempt service.* The exempt service shall include all the offices of:

(1) All the officials whose appointment, selection, and compensation are fixed by the Constitution of the Commonwealth of Puerto Rico, and all the officials appointed by the Governor with the advice and consent of the Senate or of both Houses.

(2) The executive or administrative head of each public corporation which is an instrumentality of the Commonwealth of Puerto Rico.

(3) All officials and employees of the Legislature of Puerto Rico.

(4) All officials and employees of the Puerto Rico Agricultural Company and the subsidiary organizations thereof.

(5) All officials and employees of the Puerto Rico Transportation Authority.

(6) All officials and employees of the Puerto Rico Water Resources Authority.

(7) All officials and employees of the Puerto Rico Land Authority.

(8) All officials and employees of the War Emergency Program, save those already included in the competitive service.

(9) All members of boards and commissions discharging their duties ad honorem.

(10) Referees, receivers and jurors, or any persons exercising judicial or quasi-judicial functions by appointment of any court.

(11) All election officials and all employees of the Commonwealth Board of Elections.

(12) The teaching personnel of the public education system of Puerto Rico.

(13) The Chancellor, Vice-chancellor, deans, director of the Agricultural Extension Service, director of the Agricultural Experiment Station, treasurer, registrar, finance director, auditor, director of the University enterprises, director of the editorial, director of lands and buildings, assistants to all these officials; librarians and assistant librarians, members of the teaching personnel of the University of Puerto Rico, including all its colleges, schools, faculties and dependencies; the personnel devoted to scientific, historical, literary and arts research and their assistants, the technical personnel of the University; the professional and supervisory personnel related with the diverse services to professors and students, as certified by the Chancellor and the University boards; and bona fide students of said institution who are part-time employees in the University or any government agency of Puerto Rico. The service exempt of the University of Puerto Rico shall further include the personnel not included in the preceding categories as heretofore or hereafter certified by the Chancellor with the approval of the Director.

(14) The permanent secretary of the Superior Educational Council of Puerto Rico and the officials and employees of the said Council.

(15) Bona fide high school students duly enrolled in any work-training program carried out by the Commonwealth Board of Vocational Education.

(16) All officials and employees of the Puerto Rico Industrial Development Company and subsidiary organizations thereof.

(17) All officials and employees of the Government Development Bank for Puerto Rico.

(18) All registrars of property.

(19) Patient or inmate help in Commonwealth hospitals and in charitable, penal, or correctional institutions.

(20) Officers, enlisted personnel, and all employees of military units of the Government of Puerto Rico.

(21) Persons employed on a temporary basis and in a professional or scientific capacity to make or conduct a special inquiry, investigation, examination, or consultation on behalf of the Legislature of Puerto Rico or of a Committee of the Houses thereof, or in the name or by the authority of the Governor.

(22) Persons retained or employed by the Director in accordance with clause (d) of section 645 of this title.

(23) All officials and employees of the Commonwealth Racing Commission of Puerto Rico, save those already included in the competitive service.

(24) All officers, policemen, and employees of the Police Force of Puerto Rico, including its Bureau of Criminal Investigation and Identification and its Detective Bureau.

(25) The Executive Director of the Social Programs Administration of the Department of Agriculture and Commerce.

(26) The members of the Industrial Commission.

(27) The Chairman of the Minimum Wage Board.

(28) The Manager of the State Insurance Fund.

(29) The Director of the Puerto Rico Veterans Office.

(30) The Director and other officers and employees of the Photographic Laboratory.

(31) The Chairman of the Parole Board.

(32) Repealed. May 25, 1961, No. 16, p. 46, § 2, eff. May 25, 1961.

(33) The Secretary, Marshal, Compiler and Publicist of Jurisprudence, Inspector of Protocols of the Supreme Court and law clerks and secretaries-stenographers of the individual Justices.

(34) Three officers of the Office of the Controller of Puerto Rico, appointed by the latter.

(35) The Administrative Director, the Assistant Administrative Director, the division heads, and two officers of the Office of Court Administration, designated by the Chief Justice of the Supreme Court.

(36) The Governor is empowered, in cases in which he deems it requisite for the proper functioning of his office, of the Executive Mansion, and of the Bureau of the Budget, to include one or more of the officers or employees of these offices in the exempt service or in the non-competitive service.

(38) The technical, professional and artistic officers and employees employed in connection with the establishment and operation of the public television station, as may be determined jointly by the Secretary of Education and the Director.

(39) All officials and employees of the Aqueduct and Sewer Authority.

(40) All officals and employees of the Communications Authority.

(b) *Non-competitive service.* The non-competitive service shall include the positions of:

(1) Assistant Commissioners and Assistant Chiefs of all depa tments and agencies created by the Constitution of Puerto Rico.

(2) Not more than fifteen (15) officials and/or employees of each agency, whose functions are of a policy-making, specialized or advisory nature, or of trust; Provided, That the number of the positions included under this provision in the non-competitive service shall be determined, and the designation shall be made, by the appointing authority, subject to the specific norms, conditions and proceedings approved by the Director.

(3) Not more than eight (8) employees in the Office of the Governor.

(4) The household employees of the Executive Mansion.

(5) The secretaries-stenographers of the judges of the Superior Court and the judges of the District Court, and not more than one (1) secretary or stenographer to each prosecuting attorney.

(6) The attorneys of the Department of Justice.

(7) The Income Tax Director.

(8) Public school janitors.

(9) The deputies of the secretaries and marshals of the General Court of Justice.

(10) All motor vehicle drivers and skilled and unskilled laborers working in the warehouses of, and in the distribution of food in, the School Lunchroom Division of the Department of Education.

(11) The attorneys of the Office of Court Administration.

(12) The Permit Official.

(c) *Competitive service.* The competitive service shall incude the offices or positions of all the other officials and employees of the Commonwealth Government now existing or hereafter created and not specifically included in the exempt service or in the non-competitive service.

(d) Nothing provided in this section shall preclude an appointing authoity from assigning the duties and functions of any position in the non-competitive service to an employee in the competitive service.

(e) Any appointing authority may, with the approval of the Director, utilize the services of the Office for the development of uniform classification and pay plans, and for the recruitment, promotion, and other personnel services, for any employees in the non-competitive service.

Any agency, public corporation, or political subdivision included in the exempt service or in the non-competitive service

may, at its own request and with the approval of the Director, be included in the competitive service as to the whole or any part of its functions, program, or activities; and any agency, public corporation, or political subdivision included in the exempt service may, at its own request and with the approval of the Director, be included in the non-competitive service as to the whole or part of its functions, program or activities.

Such inclusions shall comprise all the existing positions in the agency, the function, program or activity in question, at the time of approval, or those created thereafter, but the Director shall be empowered to exclude, at the time of approval or thereafter, one or more positions, if, it is so requested by the agency, public corporation or political subdivision concerned and if, in the judgment of the Director, it is convenient to the needs of the service. This provision shall be applicable both to the agencies whose inclusion has already been approved and those whose inclusion may be approved in the future.—May 12, 1947, No. 345, p. 594, § 8; June 8,1948, No. 30, p. 82, § 1; May 13, 1949, No. 323, p. 972, §§ 4-6; May 13, 1949, No. 324, p. 988, § 1; Apr. 19, 1950, No. 64, p. 158,§ 1; May 11, 1950, No. 391, p. 930, § 1; Mar. 7, 1951, No. 13, p. 30,§ 1; Apr. 5, 1951, No. 45, p. 112, § 1; May 11, 1951, No. 408, p. 1080, § 1; Apr. 16, 1952, No. 57, p 124, § 1; Const., art. I, § 1, art. IX, § 4; July 24, 1952, No. 11, p. 30, §§ 3, 8, 27; July 24, 1952, No. 12, p. 58, § 1; July 24, 1952, No. 23, p. 94; May 5, 1953, No. 9, p. 40; May 12, 1953, No. 16, p. 52; May 20, 1953, No. 22, p. 62; Apr. 9, 1956, No. 7, p. 12; Mar. 10, 1958, No. 4, p. 4; June 6, 1960, No. 59, p. 94; June 24, 1960, No. 98, p. 270; May 25, 1961, No. 16, p. 46, §§ 2, 3; June 20, 1962, No. 67, p. 143, § 1, eff. June 20, 1962

APPENDIX F

§ 1350. Confidential employees

Confidential employees are those who intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as:

(10 Officers appointed by the Governor, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

(2) Heads of agencies, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

(3) Assistant heads of agencies and their personal secretaries and drivers.

(4) Regional directors of agencies.

(5) Personal secretaries and drivers of officials selected by popular election, as well as their assistants who answer directly to them.

(6) Members of boards or standing committees appointed by the Governor and their respective personal secretaries.

(7) Members and personnel of boards or commissions appointed by the Governor having a specific period of effectiveness.

Confidential employees shall be of free selection and removal. Likewise confidential shall be those employees who though of free selection may be removed only for good cause by provision of law or trhose whose appointment is for a term pre-fixed by law.

Whenever a regular employee in a career position passes to hold a confidential position and is subsequently removed therefrom, he shall be entitled to be reinstated in a position equal or similar to the one he held in the career service at the time he passed to hold the confidential position.— Oct. 14, 1975, No. 5, p. 720. § 5.10.

APPENDIX G

§ 1421. Employees' status and rights

(1) Employees who at the time this act takes effect are holding positions in the competitive service in accordance with the provisions of Act No. 345 of May 12, 1947, as amended, or of special laws, and who pursuant to the provisions of section 1352 of this title are comprised within the category of career employees, shall have the status set forth below:

(a) those having regular status shall be career employees with regular status;

(b) those having probationary status shall be career employees with probationary status;

(c) those having provisional status shall become transitory employees until the termination of their appointment, if appointed for fixed term, or until substituted or severed from service if appointed for an indenfinite term.

(2) Employees who at the time this act takes effect are holding positions by a transitory or emergency appointment, shall remain in their posts until the termination of their term of appointment.

(3) Employees who at the time this act takes effect are holding positions in the competitive service with regular or probationary status, and who pursuant to sections 1350 and 1351 of this title are comprised within the category of confidential employees shall become career employees with the same status, but their successors shall be confidential employees. In these cases, the appointing authorities shall have the option to place them in career positions equal or similar to those they were holding and for which they meet the entrance requirements established.

Employees who at the time this act takes effect are holding positions in the competitive service with a status other than regular or probationary, and who pursuant to the provisions of sections 1350 and 1351 of this title are comprised within the category of confidential employees, shall become confidential employees.

(4) Employees who at the time this act takes effect are holding positions in agencies or subdivisions thereof, which are wholly comprised in the noncompetitive service in accordance with the provisions of Act No. 345 of May 12, 1947, as amended, and who by virtue of the provisions of section 1343 of this title become individual administrators, shall be career or confidential employees according to the criteria established by sections 1350, 1351 and 1352 of this title.

(5) The rest of the employees who at the time this act takes effect are holding positions in the noncompetitive service pursuant to the provisions of Act No. 345 of May 12, 1947, or of special laws, shall be confidential employees if by virtue of the provisions of sections 1350 and 1351 of this title they are comprised within the category of confidential employees. If, pursuant to said sections, these employees are not comprised within the confidential category they shall become confidential employees while the appointing authority keeps them in their posts, but their successors shall be career employees.

(6) Employees who at the time this act takes effect are holding positions in agencies or subdivisions thereof which are wholly comprised in the exempt service by virtue of the provisions of Act No. 345 of May 12, 1947, as amended, or of special laws, and which become Individual Administrators by virtue of the provisions of section 1343 of this title shall be career or confidential employees according to the criteria established by sections 1350, 1351 and 1352 of this title.

(7) The rest of the employees who are holding postions in the exempt service by virtue of the provisions of Act No. 345 of May 12, 1947, as amended, or of special laws, shall be confidential employees if according to the provisions of sections 1350 and 1351 of this title they are comprised within the category of confidential employees. If pursuant to said sections they are not comprised within the confidential category, they shall become confidential employees while the appointing authority keeps them in their posts, but their successors shall be career employees.

(8) Upon the taking effect of this act, the employees of municipal governments shall be classified as career or confidential employees in accordance with the criteria established by sections 1350, 1351 and 1352 of this title.

(9) Employees who at the time this act takes effect are rendering services in the Commonwealth Government in positions comprised in the competitive, noncompetitive or exempt service, pursuant to the provisions of Act No. 345 of May 12, 1947, as amended, or of special laws, or in the municipal governments, shall keep all vested rights, in accordance with the laws, standards and regulations applicable therto, provided the same are not incompatible with the provisions of this chapter, and they shall be subject to the same duties and obligations.—Oct. 14, 1975, No. 5, p. 720, § 9.

APPENDIX H
(TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

CASE NO. 0-78-379

Resolution Of The Superior Court,
San Juan Part, Peter Ortiz, Judge

TERENCE D. PIERSON, MULLER II,
Plaintiff and appellee

v.

JOSE ROBERTO FEIJOO, DIRECTOR OF THE C'ENTRAL PERSONNEL ADMINISTRATION OFFICE,
Defendant and appellant

Certiorari

MR. JUSTICE DeIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, December 29, 1978

In *Pierson Muller I* v. *Feijoo, Director O.C.A.P.*, 106 D.P.R. 838 (1978), we upheld the Superior Court's denial of the motion to dismiss filed by the Director of Personnel, in view that, in his sworn petition for injunction under our Civil Rights Act (Act No. 12 of August 8, 1974, 32 L.P.R.A. § 3524), the appellee public employeee alleged to be a career employee of the Central Personnel Administration Office (CPAO) who did not intervene in the formulation of the agency's public policy and who was dismissed for political reasons in violation of his constitutional rights to the due process of law and freedom of association and of belief. We remanded the case to the trial court, and in this second stage the defendant, Director of

Personnel, filed a motion for summary judgement[1] contending, in essence, that the plaintiff has no "property interest" in that position inasmuch as it is a confidential position. The Superior Court decided that there was no controversy with regard to said particulars which were in no way rebutted by plaintiff-appellee since "he remained idle, and did not face, pursuant to Rule No. 36, the documents and sworn statements submitted by defendant." By virtue thereof, in the next part of its resolution, the trial court made the following account of the facts found:

"Pursuant to Rule 36.4, *supra*, there is no controversy with regard to the following facts:

1) Plaintiff began to work in the Personnel Office on August 17, 1976. He held a position as Executive Director V, with a monthly salary of $1,630. Said position was in the Noncompetitive Service, by virtue of Act No. 345 of May 12, 1947, sec. 8(b)(2), as amended by Act no. 59 of June 6, 1960.

2) Up to the moment of his dismissal, plaintiff's duties were to direct the External Resources Division of the Personnel Office, formerly known as Program Coordination Office IPA, whose primary function was to secure the necessary external resources, to coordinate, to program, and to obtain federal funds.

3) On September 28, 1976, the Director of the Personnel Office designated the office's confidential position, among which plaintiff's position did not appear.

4) Effective on October 1, 1976, a form was prepared for the Report on Special Change C, which changed plaintiff's position from the Noncompetitive Service to the Competitive Service. This change affected Mr. Pierson Muller's position as well as his status as employees.

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[1] In his resolution, the trial judge describes this motion and mentions that 17 documents were attached to it amounting to 110 pages, plus a memorandum of 31 pages. In view of plaintiff's inertia, all of the documents served to support the judge's findings and conclusions.

5) There is no controversy with regard to the fact that when his status changed, plaintiff did not go through any of the previous steps required for a career appointment. He, for example, did not take any tests, nor was he evaluated, or submitted to *ternas* or *quintas*, nor did he compete with other personnel to fill the position. In other words, it was an automatic change made by virtue of the construction made by the Director of Act No. 5 of October 14, 1975, 3 L.P.R.A. § 130 *et seq*. Nobody approved the report making the change.

6) On February 8, 1977, the new Director of Personnel signed in a new plan for the agency's confidential positions, where plaintiff's position was included. This was made pursuant to Act No. 5, sec. 5.10, *supra*, because said officier,

> Substantially participates and/or collaborates in the formulation of the agency's public policy and renders advice to the Head of the Agency. (Exhibits at 92-94.)

7) On February 8, 1977, another Report on Special Change was prepared through which plaintiff was included in the Confidential Service. (Exhibits at 110.)

8) Plaintiff continued performing his duties until on April 14, 1977, defendant sent him the following letter:

> 'Dear Mr. Pierson:
>
> Pursuant to our conversation and in accordance with the confidential position plan approved by our Office, it appears that the position you hold is cinfidential pursuant to sec. 5.10 of the Public Service Personnel Act and of the Regulations implementing it. As you know, confidential employees are subject to free selection and removal, and must make way to any changes in the direction of the Agency.
>
> The position you were holding immediately before the Public Service Personnel Act was effective was one of free selection and removal since it was included in the Noncompetitive Service under the provisions of Act No. 345 of May 12, 1947. We therefore understand that you ha[illegible]e no right to reinstatement. Even supposing it was a career position, you would still be on a probationary peri[illegible]d.

> The need to have at our disposal the confidential positions necessary to implement the public policy entrusted to this office moves us to take the sad decision of terminating your services as of April 30, 1977.
>
> We do appreciate the time you have collaborated with the agency and we wish you great success in your future employment transactions, in which, if we can be of help, we will be at your services.'

Pursuant to Rule 36.4, it is established that no substantial controversy whatsoever exists with regard to the aforementioned facts. Hence, during the trial, they shall be deemen as established."

The trial judge finally concluded that the special change made by Mrs. Guzman, former Director of C.P.A.O., on October 1, 1976, under whose authority appellee claims to have been transferred from the Noncompetitive to the Competitive Service, had no legal consequence whatsoever because said Director did not have the authority at law to order said change in the employee's status in view of the fact that sec. 9(5) of the Public Service Personnel Act (Act No. 5 of October 14, 1975), provides that the employees who held positions in the Noncompetitive Service under the former Personnel Act of 1947 "shall become confidential employees while the appointing authority keeps them in their posts, but their successors shall be career employees."

Nevertheless, the trial court refused to render summary judgment. It concluded that even if Pierson Muller were a confidential employee, he could not be dismissed for political reasons, and he had cause of action for damages against the Director of C.P.A.O.; and consequently, it submitted the case to plenary proceedings to elucidate what it deemed to be a justiciable controversy. The trial judge considered that *Pierson Muller I* extended constitutional protection against dismissals due to political discrimination to cover all public employees, either career or confidential, even though the employee may not have a property interest in his position. We found an error in this last conclusion, and when the Director of

C.P.A.O. appealed before us, on November 9, 1978, we issued the following order to show cause:

> Plaintiff's condition as confidential employee having been admitted, condition which prima facie subjects him to the principle of free selection and removal provided by sec. 5.10 of the Public Service Personnel Act (31 L.P.R.A. § 1350) and bearing in mind Art. 2 of the Bill of Rights (Const., Art. II, Sec. 2), Art. I Secs. 1 and 2 of the Constitution of the Commonwealth, and our decision in *Diaz Gonzales* v. *Tribunal Superior*, 102 D.P.R. 195 (1974), plaintiff-appellee has until November 30, 1978,to show cause why we should not set aside the Resolution of September 15, 1978, issued by the Superior Court, San Juan Part, and in lieu thereof render summary judgment dismissing the petition for injunction provided by the Civil Rights Act (32 L.P.R.A. § 3524).

Plaintiff Pierson Muller, who did not appeal from the decision rendered by the trial court limiting the trial to the determination of a *confidential employee's* rights in cases of removal for political reasons, challenges in his reply brief the central conclusion of the trial judge who correctly identified him as a confidential employee.

[1-2]As it appears from the aforecited findings of facts, plaintiff was an official of the Personnel Office since August 1976, and held a position as Executive Director V with a monthly salary of $1,630. His position was included within the *Noncompetitive* Service described in the former Government Personnel Act (Act No. 345 of May 12, 1947 — 3 L.P.R.A. § 641 *et seq.)* in the group defined by its Art. 8(b)(2) which included the position of "[n] to more than fifteen (15) officials and/or employees of each agency, whose functions are of a policy-making, specialized or advisory nature, or of trust." In the new Public Service Personnel Act (Act No. 5 of October 14, 1975 — 3 L.P.R.A. §1⅛301 *et seq.)*, which only acknowledges two categories of employees — career and confidential — the latter is defined[2] as ". . . employee. . . who intervene or collaborate

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[2] It includes nonofficials like aides personal secretaries, and chauffeurs.

substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency. . ." and it provides that said confidential employees are of free selection and removal (sec. 5.10 or the Act — 3 L.P.R.A. § 1350). We had already decided that the employees in the Noncompetitive Service could be removed by the appointing authority in the exercise of a power that does not require just cause nor previous preferment of charges. *Pastor Lozada* v. *Director Ejecutivo*, 101 D.P.R. 923, 929 (1974). In the same sense, in *Baez Cancel* v. *Mayor of Guaynabo*, 100 P.R.R. 980 (1972), we extend the contitutional protection against discrimination provided by Sec. 1 of the Bill of Rights (Art. II, Sec. 1, Constitution of the Commonwealth) to modest and foresaken irregular employees who were not covered by the security provided for tenured employees by the Municipal Law and by the Municipal merit system. We now emphasize that Municipal employees covered by said system could never be classified as confidential, engaged in the formulation of public policy and government rules, which was as important point that permitted *Baez Cancel* to offer constitutional protection to said Municipal employees without violating the fundamental rights of people in the organization of a government under a democratic regime. The protection against discrimination offered to them, and to those other employees who do not intervene nor substantially collaborate in the formulation of public policy, nor advise directly or render direct service to the head agency, had not been abolished by the the nomenclature change in the new legislation which absorbed said personnel under a broader category of *Confidential Service*, pursuant to sec. 5.9 of the 1975 Personnel Act (3 L.P.R.A. § 1349).

[3]The reason why our legislation on public service personnel has acknowledged the existence and the need for confidential personnel "of free selection and removal," can be found in the essential selective nature of a government system which has the responsibility of carrying out programs, normative plans, and the public policy that has won the majority's approval in the ballots.

[4]This is not the first time we face a case of an administrative action which tried to change a position from the *Noncompetitive* to the *Competitive* service, now called Career Service, to transfer an employee from policy-making and confidential position, to a status that allows removal only through just cause and previous preferment of charges and hearing. Upon rejecting, as prejudicial to the merit system, the change that favored an employee who had not taken the examination, nor competed with other candidates, in *Diaz Gonzalez* v. *Tribunal Superior*, 102 D.P.R. 195, 210 (1974) we said:

> It should be clear that policy-making officers of the executive and of the majority in the legislature should have, when considering the problems of the country, a government philosophy, and attitudes consistent with—and not contrary to—those of the government elected by the people and under which they serve. That gives effect to the popular mandate, inasmuch as it makes it possible to carry out the government program which the electorate favored at the polls. The opposite would be to frustrate said popular mandate. The Personnel Act, acknowledging that reality, wisely places those positions in the Exempt and Noncompetitive Services. It also places among the aforementioned services the offices and positions of trust, as usually are those of the assistant of an exempt executive or that of his personal secretary. Those policy-making officers and those offices and positions of trust constitute a very reduced percentage of all the government personnel.

[5]The changes in the administration supervened after the General Elections shall necessarily affect those positions whose holders implement public policy, or perform normative or confidential functions, inasmuch as they cannot mediatize the will of the people expressed in the ballots in favor or certain government programs and electing new administrators. The Constitution of the Commonwealth cannot tolerate any obstacle to the legal exercise or the power that stems from the people's sovereignty. In its Preamble, it declares that the will of the people is the source of public power; this principle is reiterated in Art. I, Sec. 1, stating that the political power of the State emanates from the people and shall be exercised in

accordance with their will; and in Sec. 2, stating that the Legislative, Executive and Judicial powers are subordinated to the sovereignty of the people; and affirming the value and effectiveness of the vote in Sec. 2 of the Bill of Rights (Const. Art. I, Sec. 2) when it provides that: "The laws shall quarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise."

[6-7]Electoral franchise would be meaningless if the men elected to govern were not able to give effectiveness to the vote casted.[3] The popularity acquired by this fundamental principle of the democratic regime is an excellent reminder for the so-called confidential employees that the vote's effective value precludes them from the expectation of continuity and from all possible property interest in such sensitive positions. Individual aspirations are transcended by the supreme action of the democratic assertion, circumstance which becomes manifest in the Report of the Commission on the Bill of Rights of the Constitutional Convention, subscribed by its President, Mr. Jaime Benitez, on December 14, 1951, at p. 47:

". . . The most liberal protection of the rights of the individual, which is this Bill of Rights, cannot ignore the fundamental

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[3] "It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to vote, that is protected.

A vote is not an object of art. It is the sacred and most important instrument of democracy and freedom, In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the vote of other citizens results in effecting the will of those citizens provided that they are more numerous than those of deffering views. That is the meaning and effect of the great constitutional decisions of this Court.

In short, we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose." Judge Fortas, with whom Judges Warren and Douglas join, dissenting in *Forston* v. *Morris*, 385 U.S. 231, 250 (1966).

principle that its supreme law is the welfare of the people. Individual rights must be understood within the general framework of society in accordance with the limitations implied by daily life. We have already pointed out how necessary it is to have equanimity to allow us to conjugate the individual rights which if unrestricted would be in conflict with the community's life, health and welfare, represented this community by the Legislative Assembly." *cf. Hermina Gonzalez* v. *Srio. del Trabajo*, 107 D.P.R. 667 (1978).

[8]Since plaintiff appellee's confidential condition was not altered by Special Change C effected on October 1, 1976, which was made with no authority at law,[4] he was subject to the free will of the appointing authority, and devoid of constitutional protection in his employment.

The writ of certiorari shall be issued, and judgment shall be rendered accordingly in lieu of the resolution appealed from, which shall be annulled.

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[4] Section 5.11(7) of the 1975 Personnel Act (3 L.P.R.A. §t1351(7)) provides that:

"The change of category of a confidential position to a career position shall only be authorized when a change occurs in the functions or in the organizational structure of the agency so justifying it, if the position is vacant, or, if not vacant, if the incumbent may occupy it subject to the following conditions:

(a) that he meets the requirements established for the class of position;

(b) that he has occupied the position for a period of time no less than the time corresponding th the probationary period for the class of position;

(c) that he passes or has passed the test established for the class of position; and

(d) that the appointing authority certifies that his services have been satisfactory."

CHIEF CLERK'S CERTIFICATE

I. Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on December 29, 1978, in case No. 0-78-379, *Terence D. Pierson Muller II* v. *Jose Roberto Feijoo*, the original of which, in Spainish, is under my custody in this office.

IN WITNESS WHEREOF, at the request of the interested party, I issue these presents for official use, free or charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 23rd day of June 1982.

LADY ALFONSO DE CUMPIANO
Chief Clerk
Supreme Court of Puerto Rico

APPENDIX I

(Diaz Gonzalez *v.* Superior Court)

ELISA DIAZ GONZALEZ, ETC., Petitioner, *v.* SUPERIOR COURT OF PUERTO RICO, SAN JUAN PART, HECTOR A. COLON CRUZ, JUDGE, Respondent; CARMEN DE LOURDES BORGES, Intervener.

No. 0-73-206. Decided April 22, 1974.

1. ADMINISTRATIVE LAW — POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS, AND AGENTS—IN GENERAL—DUE PROCESS OF LAW—DISCHARGE OF EMPLOYEES.

An employee who occupies a position of trust included in the Non-Competitive Service of the Government of Puerto Rico occupies his position at the will of the appointing authority.

2. WORDS AND PHRASES

Competitive—The term *competitive* in the context in which it is used in the Personnel Act and used in this opinion means the appearance or competition by the candidates to an office or position performed through examinations or exercises showing their fitness and qualifications to occupy the position to which they aspire.

3. ADMINISTRATIVE LAW—POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS, AND AGENTS—IN GENERAL—POWERS OF AGENCIES—PERSONNEL BOARD.

It is unlawful to transfer an employee who occupied a key policy-making position of trust from the Non-Competitive Service to the Competitive Service without the latter having approved any examination whatsoever for the position which she occupied.

4. RULES OF CIVIL PROCEDURE OF 1958—PROCEEDINGS IN SPECIAL MATTERS—EXTRAORDINARY REMEDIES—MANDAMUS.

The issuance of a peremptory writ of mandamus does not lie unless two circumstances are present: *(a)* that the right to demand the immediate performance of the act is evident and, *(b)* that it appears that there is no excuse for not performing it.

5. ADMINISTRATIVE LAW—POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS, AND AGENTS—IN GENERAL—POWERS OF AGENCIES—PERSONNEL BOARD.

The development of the merit system in the public service of the Government of Puerto Rico is recited in the opinion.

PROCEEDING in Certiorari to review in Order of Mandamus of *Hector A. Colon Cruz*, Judge (San Juan), ordering petitioner to reinstate the intervener herein in the position of Regional Director of the Department of Social Services of Puerto Rico in Humacao. *The writ of certiorari is issued, the order of this Court of June 15, 1973 in the case at bar is set aside, the order of mandamus entered by the trial court on May 25, 1973 as well as the amended order of mandamus entered on May 31, 1973 are reversed, and the petition for mandamus in this case is dismissed.*

Francisco De Jesus Schuck, Secretary of Justice, Myriam Naveira Rodon, Solicitor General, Peter Ortiz, Deputy Solicitor General, and *Roberto Armstrong, Jr.* for petitioner. *Jose Ramon Perez Hernandez* for intervener.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-73-206

ELISA DIAZ GONZALEZ, etc.,

Petitioner,

v.

SUPERIOR COURT OF PUERTO RICO, SAN JUAN PART, HECTOR A. COLON CRUZ, JUDGE,

Respondent

CARMEN de LOURDES BORGES,

Intervenor

Certiorari
Administrative Law
Personnel Act

MR. JUSTICE RIGAU delivered the opinion of the Court.

(San Juan, Puerto Rico, April 22, 1974)

This opinion and the one rendered in *Pastor Lozada* v. *Executive Director*, decided on February 4, 1974, 101 P.R.R. ____, in a certain sense complement each other. In the latter we explained how the provisions of the Personnel Act which divide the offices and positions of the public service of Puerto Rico in three large groups, to wit, Exempt Service, Non-Competitive Service, and Competitive Service, operate.[1] In *Pastor Lozada*, *supra*, we described the freedom which the appointing authority has to appoint and remove employees in the Exempt and Non-Competitive Services and the law

[1] Personnel Act, Act No. 345 of May 12, 1947, as amended, 3 L.P.R.A. § 641 *et seq.*

requirements which have to be observed to appoint as well as to remove personnel in the Competitive Service. In the case at bar violations to the Personnel Act committed by the appointing authority upon appointing or including certain personnel in the Competitive Service are involved.

The intervener is an employee of the Department of Social Services of Puerto Rico. During the year 1972 she occupied the position of *Regional Director* of said Department. Said position, due to its policy-making and trust nature, was included in the *Non-Competitive Service* of the Personnel Act of the Government of Puerto Rico. Said classification of the position at the will of the appointing authority. This is so as a question of a sound, correct, and well-established rule in all the scientific systems of personnel administration insofar as positions of trust are concerned.[2]

On October 2, 1972, a month before the general election held in Puerto Rico on November 7, 1972, the head of the Department of Social Services changed all the positions of *Regional Directors* of said Department, from the *Non-Competitive* to the *Competitive Service* and he gave the status of Competitive Service employee to the intervener without the latter having approved any examination whatsoever for said position. That is, without the intervener having appeared at tests or having competed with other possible candidates or applicants for the position.[3] This was done in violation of the Personnel Act and of the spirit and the philosophy which underlie the merit system.

In other words, an employee who occupied a key policy-making position of trust and which was correctly included in

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[2] See sec. 8 of the Personnel Act, 3 L.P.R.A. § 648(b)(Σ).

[3] The word "competitive" in the context in which it is used in the Personnel Act and used in this opinion means the competition by the candidates to an office or position performed through examinations or exercises showing their fitness and qualifications to occupy the position to which they aspire.

the *Non-Competitive Service*, was given, without observing the law, the status of *Competitive* employee, entitled to be removed only through preferment of charges and for just cause, as if it were merely a question of a clerical employee and position, without policy-and rule-making powers and not of a trust nature.

The obvious result of the above-described operation would be that a new head of the Department of Social Services would be bound to direct and operate all of a Department of the Government surounded by assistants—the Regional Directors—who were not persons of his trust. It is not necessary to be an expert in Political Science, or in Public Administration to understand the anomaly of the situation which it was sought to create.

What was to be expected occurred. A new head of the Department arrived and being in recruiting trustworthy personnel for the position of trust specifically for the positions of Regional Directors, which are her *alter ego* in each region of the country, she did not remove but only changed the work of the intervener assigning her to another position in the Department in accordance with her experience and ability.

Feeling aggrieved by what has been stated in the preceding paragraph, the intervener filed a petition for mandamus before the Superior Court, San Juan Part, requesting the Court to order the replacement of petitioner herein in the position of Regional Director of the Department of Social Services. Although in the petition intervener alleged that she did not have any other remedy at law, nevertheless she presented on the same month and year a complaint before the Personnel Board under the authority of the Personnel Act. We do not favor those allegations which do not correspond to the reality.

On the same date of the presentation of the petition for mandamus, the Court, without summoning or hearing defendant, the Secretary of Social Services, issued an Order ordering defendant to replace the petitioner therein in the aforementioned position of Regional Director. The court also ordered

defendant to appear on July 18, 1973 for the holding of a hearing. As the peremptory order is dated May 31, 1973, the same obliged the Secretary of Social Services to keep in the position of Regional Director, a policy-making position of trust, a person in whom she had not placed her confidence, for a term of a month and a half.

That meddling in the functions of the Executive Branch was by all means unjustified since in the case no emergency circumstance was present to justify it and the tact, consideration, and comity which the three branches of the Government owe to each other should have prevailed.

Besides, the law provides that in order to issue a peremptory writ, as it was done in this case, two circumstances must be present: (a) that the right to demand the immediate performance of the act *is evident* and (b) *that it appears that there is no excuse* for not performing it. A serene adjudication in this case would have acknowledged that although it was possible that petitioner herein was entitled to what was requested her right was not evident, but was controvertible, and it would also have acknowledged that it was possible that the defendant, a Secretary of the Government, could have an excuse or valid reasons for not performing the requested act. Rule 55 of the Rules of Civil Procedure.

As we said in *Davila* v. *Gen'l Supervisor of Elections*, 82 P.R.R. 257 (1960), at page 276:

> "In order for a writ of mandamus to issue, however, it is not sufficient for the petitioner to have a clear right to what he requests and that the respondent have the corresponding duty to permit the exercise of that right. It is a 'high prerogative' writ, as stated in the law creating the same 32 L.P.R.A. § 3421, and the courts must necessarily weigh all the attendant circumstances in determining whether or not the writ should issue, as well as in fixing the context of the order, once the initial question is affirmatively decided. In other words, the remedy is not granted *ex debito justitiae* and as soon as the right of the petitioner is acknowledged, but only when the court is

convinced that purposes of social and individual utility shall be complied with. To those ends, it is indispensable to calculate what shall be the effects of the order on the proper performance of the responsibilities of the officer affected thereby and up to what point it shall benefit the petitioner. In short, we must necessarily establish the most perfect equilibrium possible between the different conflicting interests."

On June 15, 1973, we dismissed the present petition for certiorari filed by the Solicitor General but his well-reasoned motion for reconsideration having been examined, we decided that in justice we should reconsider and we issued an Order to Show Cause consolidating this case with two others and we gave defendant and the interveners a term to show cause why our orders of June 15, 1973 in these three cases should not be set aside, the writ of certiorari requested by the Solicitor General should be issued and the writ of mandamus issued by the Superior Court of May 25, 1973 in said cases and the amended order of mandamus issued by said Court on May 31, 1973 in the case at bar should be reversed.

After an extension was granted, the intervener presented a brief showing causes, which has not convinced us.

The Personnel Act of the Government of Puerto Rico—specific citation in footnote 1 of this opinion—is a legislative piece which honors the Legislature of Puerto Rico and which should be observed, constructed, and applied with the tact, care and respect which well-made things deserve. Said act has well-known precedents in the public and governmental adminstration of other countries.

This is not the place to make a detailed account of the development of the merit system in the world, but it harms not that the attorney or the judge, upon construing or applying an important institution of law be conscious of its roots and of its development throughout the years. If that is to ask too much, they should at least be conscious that there are such roots and

such development; that it is not a question of improvisations of yesterday existing as a result of whim.[4]

It deserves to be remembered that—at least in the modern world—Prussia was the pioneer nation in this matter. The commencement of a civil service system based on merit, which, subject to the subsequent and necessary amendments, did not have an equal in the world for more than one and a half centuries, was established in that country in the 17th Century. The qualifications of candidates to public offices and positions were tested in that system by means of written and oral examinations.[5]

In France the incipient system of civil service established by the monarchy was swept away by the revolution but the genius of Napoleon made it possible to establish a system on more solid bases, which, together with that of Prussia, exercised considerable influence in many other countries.

In England public administration in national scale had its beginnings after the invasion by William the Conquerer. Part of that administration was the administration of Justice. As it is known, as a result of the administrative reforms of Norman Kings and of those that followed them, the duties imposed by the local courts of the feudal lords were discontinued and instead the duties imposed by the judges appointed by the king started to be applied, so that only one law was applied through-

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[4] See, for example, Castan, *Teoria de la Aplicacion e Investigacion del Derecho* 105 *ab initio* (1947); C. K. Allen, *Law in the Making* 3, 7th ed., Oxford P.B. (1966); Holmes in his Introduction (1911) to volume 1 of the *General Survey of Continental Legal History* from the Continental Legal History Series, Rothman-Kelley (1968) ed.,p. xlv; W. Freidmann, *Legal Theory*, ch. 5,5th ed. (1967).

[5] Since 1640 and for more than one century Prussia was ruled by four kings, three of whom had administrative genius of high order: Frederick William of Brandenburg (1640-88), Frederick William I (1713-40), and Frederick the Great (1740-86). Finer, *The Theory and Practice of Modern Government* 727, rev. ed. (1960).

out all the kingdom, that is, a "common law" to all. The Anglo-Saxon "common law" came forth thus.[6]

Said national public administration in England attained a notable development under Henry II (12th Century) and continued its gradual development as the administrative, legislative, and judicial functions were differentiated among themselves. That slow historical development suffered a pause as a result of the English political fights of the 17th Century, as a consequence of which the supremacy of Parliament was established in England. This is not to be regretted, nevertheless, because of the development of constitutionalism, that is, of the government with limited powers, and of the individual freedoms, the result of those upheavals, have practically benefited the whole world.

Despite the aforementioned interruption, or perhaps as a result thereof, from the second half of the 19th Century on England produced the civil service par excellence. Its competence, probity, and patriotism have not been excelled by any other merit system. The famous "Order-in-Council" of 1855, which established the English Civil Service Commission, and which set the bases for the Civil service reform in that country, is to be remembered.

In the United States, after the disgraceful experience of the so-called spoils system, the movement of civil service reform acquired strength after the war between the states. Of course, long before that, illustrious minds had already advocated the establishment of the merit system in the federal and the state governments. The aforementioned reform movement culminated with the Pendelton Act of 1883, basic law of the federal government civil service. For a fairly detailed account of the development of the merit system in the government of the

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[6] Which should not be confused with the (civil) law common to all Spain, as different from the statutory one. See, I-1 Castan, *Derecho Civil Espanol, Comun y Foral* 128-129 and 195, 10th ed. (1962).

United Staes, see Chapter I of Kaplan's book, *The Law of Civil Service* (1958).

The first civil service act of Puerto Rico was the act approved on March 4, 1907. It created a Civil Service Board, later called Civil Service Commission, which was composed of three members appointed by the Governor with the approval of the Executive Council. The reference to the Executive Council is explained because said act was approved under the regime of the Foraker Act.

The aforesaid Act of 1907 divided the civil service between the classified and unclassified civil service. The unclassified corresponded, in general terms, to the high-ranking officers and to the employees of trust which today are under the Exempt Service. The other offices of the government were included in the classified service, with the exemption of teachers, policemen, and the registrars of property. The act established that the appointments would be made according to the merits of the candidate and after an examination. The Civil Service Commission, as in usual in these administrative agencies, had judicial, legislative, and executive or administrative functions also.

Everything seems to indicate that the political climate was not ready yet for the self-discipline which a merit system in the public service implies. Sufficient funds were not assigned to the Commission (from 1907 to 1924 its personnel consisted only of two office clerks), the law was evaded making unclassified "temporary" appointments, which lasted for years and the purpose of the law was not generally accomplished.

In 1931, a reformist governor, Theodore Roosevelt, decided to revive the idea of the merit system and in his message to the Legislature, he started as follows:

> "The ground on which a competent administration rests is an Act of Civil Service, intended to satisfy the principle of merit. At present our law does not accomplish those

purposes and it must be amended or repiaced so that the merit principle be strengthened and protected."[7]

As a result of the efforts of Governor Roosevelt, our second civil service act, Act No. 88 of May 11, 1931; was approved. Like the previous law it divided the civil service into classified and unclassified service. It created a Civil Service Commission composed of three persons appointed by the Governor with the advice and consent of the Senate. Not more than two could belong to the same political party and they would hold their positions for the term of four years.

At the commencement of the works of the new commission considerable enthusiasm was generated. The pertinent rules were promulgated and the employees with temporary appointments were classified and included in the classified civil service. Despite the initial enthusiasm history showed that that critical decade from 1930 to 1940 was not the proper one for the development of the merit system either. By the end of that decade again almost all the employees were "temporary" employees, who had not taken any examination as required by the rules.

The difficult and rough years are the ones which produce in societies the longings for reform and the ones which temper the souls which are able to carry them out. Thus, in the year 1940 and in subsequent years men who embodied the longings for political and economical reforms which the vicissitudes of the previous twenty years had generated, entered the political and administrative scene of the country.[8]

In order to carry out the ample reforms which the men of the new government planned to perform trained and competent

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[7] *Minutes of the House of Representatives of Puerto Rico* 16-17 (1931).

[8] See Goodsell, *Administration of a Revolution*, Harvard U. Press (1965), and Wells, *La Modernizacion de Puerto Rico*, editorial U.P.R. (1972). It is a Spanish translation of the book *The Modernization of Puerto Rico* of said author, Harvard U. Press (1969).

personnel was needed. At first it was necessary to recruit technical personnel from outside Puerto Rico but it was clear that in order for the reforms not to be ephimeral, but that they could perdure, it was necessary to train native personnel and to put in their hands the direction and performance of the government programs. In his fifteenth message to the Legislature of February 9, 1943, Governor Rexford Tugwell, discussing the need of a reform in the civil service stated:

> ". . . I shall . . . discuss . . . the measures for improvement. One of them—the most important—would reorganize the Civil Service Commission making the Commission an appeals board but entrusting . . . personnel functions to a non-political Administrator."[9]

The government entered into a contract with Public Administration Service of Chicago, a highly regarded consulting firm, to help in this matter. In solidarity with that administrative reform movement, the University of Puerto Rico held at the end of 1945 a Conference on Public Administration in which distinguished personalities from this country and from the United States participated.

Endorsing with his official authority and with his great prestige and doubtless personal disinterestedness, the merit system in the public service, the then President of the Senate of Puerto Rico, Luis Munoz Marin, stated in said Conference as follows:

> "We cannot deprive our people of the services of the better servants . . . We, who are disinterestedly in the political life, have a people to serve and friends to be pleased appear before us. In all cases in which one or the other claim come into the struggle, there is no room in any responsible citizen for doubt as to which should be his decision: it should be, of course, to remember that there is a people to be served—a people greatly oppressed whom we must serve greatly."

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[9] Tugwell, *Puerto Rico Public Papers* 144 (1945).

Further on the said:

> "As President of a political party, and of a majority political party which is developing . . . a vast program . . . I must say very frankly to all Puerto Ricans . . . that all the good laws that have been passed and that will be passed will become null if a constant improvement in technical training and general understanding is not maintained in the large body of our public servants. To this end—in which the security of the public servants is also involved—this School of Public Administration should contribute in an important manner, with the good will of all.

. . .

> "The political party . . . because of its majority in the Legislature and because of its controlling position as to the key executive positions of the government, translates that mandate into laws and has a conclusive vote as to the attitude of the men who shall hold the key executive positions in the practical handling of that mandate. Beyond that, the political party cannot intevene in a controlling manner except at the expense, in the short or in the long run, of a good public administration."[10]

With the advice of the aforementioned Public Administration Service of Chicago a bill was drafted, which was submitted to the Legislature and which became our present Personnel Act, Act No. 345 of May 12, 1947; 3 L.P.R.A. § 641 *et seq.* This Act established the merit system and divided the civil service into three groups known as (a) Exempt Service, (b) Non-Competitive Service, and (c) Competitive Service.

Of course, the best text where to learn about the system thus established is the Personnel Act itself, but you can see *Pastor Lozada* v. *Executive Director*, cited at the commencement of this opinion, where we briefly described how these provisions of the law operate. See also, Garcia de Serrano, *La Seleccion de Personal en el Servicio Publico de Puerto Rico* 13-23, U.P.R. ed. (1969).

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[10] U.P.R. and Civil Service Commission, *Puerto Rico y su Programa de Adminstracion Publica* 19-28, Minutes of the Conference on Public Administration (1945).

Said Act No. 345 created a Personnel Board composed of three members appointed by the Governor, with the advice and consent of the Senate, for a term of four years. Not more than two of them may belong to the same political party. Among others, the Board has advisory and quasi judicial duties. The act also created the position of Director of Personnel, who is the executive of the personnel system of the Government of Puerto Rico and who is appointed by the Governor of Puerto Rico with the advice and consent of the Senate, for a term of six-years.

Pursuant to the act, the Governor shall not capriciously appoint the Director of Personnel, inasmuch as the act itself expressly orders that the Director "shall be a person who has had experience in personnel administration and who is familiar with its principles and methods and who is in sympathy with the application of merit principles and scientific methods of public employment."—§ 3 of the Personnel Act; 3 L.P.R.A. § 643.

Thus, through lengthy decades of effort, of success sometimes and of frustrations others, the merit system became a reality in the personnel administration of the Government of Puerto Rico. The Personnel Office is in charge of the recruitment, classification, pay, and training of the public employees which under its authority serve the country. It grants scholarships to study, performs studies to maintain the classification and pay plans up-to-date, carries out a cultural trips program, in short, it is in charge of the functioning and improvement of the personnel system of the government of Puerto Rico.

The aforecited author Garcia de Serrano in her aforementioned book, concludes the second chapter of her book with these words:

> "All these activities are carried out by the Personnel Office free of prejudice and political favoritism. The increasing number of selections made on the basis of merit by the certification system and the decrease in the

> appointments of temporary and provisional employees, in impressing. Today, it can be said that the personnel system of the Government of Puerto Rico is an efficient and honest service, free of political, religious, and racial prejudices and inspired by an intense desire of public service and a zeal for self-improvement."

Such an excellent situation suffered unusual misfortunes two or three or four years ago, some of which are rising now to the surface in the form of litigations before the courts, such as the case at bar, the other two which were consolidated with the latter and others which are in process. Nevertheless, this critical situation in the civil service administration of the country seems to have been short and temporary.

The problem is basically one of education. Of the general education of the country and of its political and administrative leaders. In the United States, where, as we have seen, the development of the merit system was also relatively recent, professor Woodrow Wilson, later President of that country, called the attention in his already classical article *The Study of Public Administration* (1887) to the need of promoting the study of these matters.[11]

The knowledge of these matters by political and administrative leaders of the country is as important as its dissemination among judges, attorneys, and the general public. This is so because political leaders and executives of the Government make controlling decisions as to how their government shall; judges and attorneys interpret and judge those that rise litigations and it corresponds to the general public to endorse a good administration and to reject a bad one. As Professor Munoz Amato has accurately written:

> "The truth is that the principles of merit for the public service, nor any of its instrumental requirements can be

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[11] The cited article by Wilson appears published in several antologies. One of them is *Public Administration and Policy*, (1966) ed. by P. Wall.

established, if there does not exist a favorable consensus in the sectors where the fundamental decisions on government orientation are made. Even more, the efficiency of any system of personnel administation shall continually depend on the degree of integrity and sincerity of the political backing on which it is grounded."[12]

A distinguished governor and politician of Latin America, in a book addressed to his countrymen but the reading of which would benefit all, entitled *Cartas a un Ciudadano* has stated with exemplary simplicity, accuracy, and candor the following:

"One of the interesting things which I am learning in this presidential office in which you have put me, is that the Government fulfills two different functions, which we generally confuse, as if they were only one.

"These two functions may be called, in order to distinguish them with different names, "to administer' and 'to govern.'

"*To administer* is to direct the daily functioning of the public agencies just as a particular concern of a large business is managed. To distribute the work in an organized manner, to see that each officer fulfills his duty, receive the income of money and make the expenses keeping good accounts.

"*To govern* is, in this distinction which I am making, to direct the national effort towards the formation of a better country, constituted by better citizens, and which shall provide a better ambit of life to their children. . . .

"To put order and require efficiency at the public offices, is good administration. To study the causes of the national ills, to conceive plans to remedy them, to create the necessary institutions, and to encourage the most desirable customs, is good govenment."[12-A]

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[12] II Munoz Amato, *Introduccion a la Administracion Publica* 91 (1957).

[12-A] Jose Figueres, *Cartas a un Ciudadano* (1956).

It should be clear that policy-making officers of the executive and of the majority in the legislature should have, when considering the problems of the country, a government philosophy, and attitudes consistent with—and not contrary to—those of the government elected by the people and under which they serve. That gives effect to the popular mandate, inasmuch as it makes it possible to carry out the government program which the electorate favored at the polls. The opposite would be to frustrate said popular mandate. The Personnel Act, acknowledging that reality, wisely places those positions in the exempt and Non-Competitive Services. It also places among the aforementioned services the offices and positions of trust, as usually are those of the assistant of an exempt executive or that of his personal secretary. Those policy-making officers and those offices and positions of trust constitute a very reduced percentage of all the government personnel.

Of course, what has been said in the preceding paragraph is not applicable to the officers for whose positions the law provides a fixed term of tenure. Those are removable only for just cause inasmuch as the law, because of the nature of said functions, fixes them a term in the position to guarantee them their independence of opinion. *Pastor Lozada* v. *Executive Director*, *supra*.

Besides, the personnel which does not participate of the above-mentioned characteristics—policy-making or of trust—pursuant to the Personnel Act and pursuant to the best doctrine of public administration, is in the Competitive Service.

It should be easily understood that the efficiency with which an administrative agency operates is limited by two principal factors: one is the *quality of the mechanism*, and the other is the *personal competence* of the officers and employees in charge of whom it is.

The purpose of the Personnel Act is to create the conditions which make it possible to attract and retain the best public servants. Therefore, the principal purpose of the regime which establishes the Personnel Act is that the country be served by

the most competent and best servants. It is an act eminently invested with public interest.

Public service requires not only technical expertness, but also attitudes and ideals of honesty, self-discipline, respect to the human dignity, and dedication to the general welfare. The public servants which do not occupy eminently policy-making offices and who, therefore, do not have to cease in their positions when the Administration changes—according to what we have explained before—are under the obligation to serve with the same efficiency the different directors that successively are entrusted with the responsibility of governing, inasmuch as that obligation to serve is grounded on more ample and basic loyalties than mere partisan loyalties.

Said obligation to serve is grounded on the loyalty to the country, to the Constitution, to the ideal of the primacy of the law over the possible human arbitrariness, to the respect of man's dignity, on the sound pride or professional spirit of the public servant, and in short, on the high values of the spirit.

Likewise, the country expects that the politicians and the highest level administrators have also an unchangeable basis of common values on which—despite their differences of ideological order—they may save, keep, and advance the general interest. In this sense, it is possible for said leaders to preserve their particular political ideology at at the same time back and support those values as the one represented by the Personnel Act, inasmuch as said act represents an undoubtable value of general benefit and by itself neither favors nor hinders any political ideology in particular.[13]

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[13] On civil service and the merit system the following may be seen in addition to the works cited in this opinion: Friedrich, *Constitutional Government and Democracy*, chs. 2 and 19, 4th ed. (1968); Max Weber, I *Economia y Sociedad* 170-180, Spanish translation of 1964 from Fondo de Cultura Economica, Mexico; Friedrich and Cole, *Responsible Bureaucracy* (1932); Greer, *A Bibliography of Civil Service and Personnel Administration* (1935); Greaves, *The Civil Service in the Changing State* (1943); Robson, *The Civil Service in*

It is proper to make the following clarification for the purpose of preventing future mistakes in the administration of the Personnel Act as the one committed in the case at bar. The change of classification made in this case and aforedescribed cannot be made on the basis of paragraph (c) of sec. 9 of the Personnel Act, 3 L.P.R.A. § 649(c). Said provision placed within the Competitive Service those persons who *at the date* when the Personnel Act (May 12, 1947, *became effective* occupied positions which were not included within the classified civil service but which by virtue of the Personnel Act said positions became included within the Competitive Service. In that case it is a question of a *transitory provision* which was included in the act to take care of the particular situation which we have described. The date of effectiveness of the Act having elapsed, said provision complied with its purpose and is no longer effective.

It should be clear that if said paragraph (c) of the cited sec. 9 could be utilized to include within the *Competitive Service* persons not included within the classified service, or persons included in the Non-Competitive Service or in the Exempt Service, the result would be the complete destruction of the merit system created by the Personnel Act. This is so because under that assumption—which is incorrect—the status of *competitive* employee could be arbitrarily given to any employee without having taken examinations or any competition whatsoever and without complying with the requirements of the act.

According to the foregoing, the requested writ of certiorari will be issued, our order of June 15, 1973 in the case at bar will be set aside, the order of mandamus entered by the trial court on May 25, 1973 in this case will be reversed, the amended

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Britain and France (1956); Kingsley, *Representative Bureaucracy* (1944); Friedrich, *"The Continental Tradition of Training Administrators in Law and Jurisprudence,"* 11-2 *Journal of Modern History* (1939).

order of mandamus entered on May 31, 1973 will be reversed, and the petition for mandamus in this case will be dismissed. The other two cases which were consolidated with this one, No. 0-73-207 and No. 0-73-208, will be decided by means of separate judgments.

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on April 22, 1974, in case No. 0-73-206, *Elisa Diaz Gonzalez, etc.* v. *Superior Court of Puerto Rico* the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 23rd day of June 1982.

/s/ Lady Alfonso de Cumpiano
LADY ALFONSO DE CUMPIANO, Chief Clerk
Supreme Court of Puerto Rico

EXHIBIT 4

APPENDIX J
(TRANSLATION)

June 25, 1973

Mrs. Milagros Guzman
Director
Personnel Office
San Juan, Puerto Rico 00904

Dear Mrs. Guzman:

Among this Department's positions included in the Non-Competitive Service pursuant to art 8(b)(2) of the Personnel Act, there is one of Automobile Chauffeur II, assigned to the General Service Division. At present it is held by Luis H. Villafane Cruz, who was appointed thereto on March 21, 1973.

Mr. Villafane Cruz has submitted his resignation, to become effective on June 30, 1973. Since I so not deem it necessary to include said position in the Non-Competitive Service, I hereby notify you that I have decided to change it to the Competitive Service, effective on July 1st, 1973.

As of that same date, I will include in the Non-Competitive Service position No. 236 of Executive Director I, assigned to the Aguadilla Regional Office. This position, whose functional title is Regional Director, was created on July 1, 1972 and since then, it has remained in the Competitive Service.

This action is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, The Aguadilla Regional office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given my law. In his

capacity, he represents me as Secretary of Commerce, while he also represents our government.

Cordially,

(sgd) Damian O. Foch
DAMIAN O. FOCH
Secretary of Commerce

APPENDIX K

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the present translation into the English language made by *Mrs. Nellie Diaz de Gorbea*, Translator, as checked and corrected by the Bureau of Translations of the Supreme Court of Puerto Rico, conforms to the original Transcript of the Record which appears of record, in Spanish, in case No. R-81-137, *Ramos Villanueva* v. *Department of Commerce*, before this Court.

IN WITNESS WHEREOF, under the authority of Act No. 87 of May 31, 1972, I issue these presents at the request of the Department of Justice of Puerto Rico, for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 12th day of July 1982.

/s/ Lady Alfonso de Cumpiano
LADY ALFONSO DE CUMPIANO, Chief Clerk
Supreme Court of Puerto Rico

APPENDIX K
(TRANSLATION)

IN THE SUPERIOR COURT OF PUERTO RICO
AGUADILLA PART

CIVIL NO. TS-77-642

Re: CIVIL ACTION

ARTURO RAMOS VILLANUEVA, *Plaintiff*

v.

DEPARTMENT OF COMMERCE *Defendant.*

TRANSCRIPT OF THE RECORD

Through an order issued by the Honorable Judge, Antonio R. Barcelo, on June 16, 1981, as well through notice served on June 24, 1981, by the Clerk of this Court, I proceed to transcribe the statement of Mrs. Ana Julia Elias de Fernandez, ordered by the Honorable Supreme Court of Puerto Rico.

The hearing of the case at bar was held on April 15, 1980, and the same was presided by Honorable Aladino Torres Rivera, Superior Court Judge.

The plaintiff was represented by Noel Vera Mercado, Esq., and the defendant by Eliezer Aldarondo Ortiz, Esq.

The following is the transcript of the statement of Mrs. Ana Julia Elias de Fernandez.

SWORN STATEMENT BY WITNESS
ANA JULIA ELIAS DE FERNANDEZ

HON. JUDGE: Go ahead. Counsel.

ALDARONDO, ESQ.: Your Honor, let us ask the Honorable Court to allow us to conduct the examination sitting down so as to be able to take notes.

HON. JUDGE: Permission granted.

ALDARONDO, ESQ.:

Q. Witness, please address the Honorable Judge at all times, what is your name?

A. My name is Ana Julia Elias de Fernandez.

Q. Where do you work at present?

A. I work in the Department of Commerce.

Q. Since when you are working in the Department of Commerce?

A. I started to work in the Department of Commerce December the first, 1974.

Q. In what position are you presently working in the Department of Commerce?

A. Now, I hold the position of Personnel Director of the Department of Commerce, it is the same position that I have held since December 1st, 1974.

Q. What are the duties of your office as Director of Personnel of the Department of Commerce?

A. Basically, I have to direct an administration of personnel program for the Department of Commerce.

Q. Mrs. Fernandez, what is the document that you are being shown?

A. This is the personal record of Mr. Arturo Ramos Villanueva.

Q. What can be gathered, if anything, from the record of Mr. Ramos Villanueva in regard to . . . for the day of June 25, 1973?

HON. JUDGE: June or July?

ALDARONDO, ESQ.: June.

HON. JUDGE: June.

ALDARONDO, ESQ.:

Q. As to 1973, regarding a change in position number two, regarding a change in position number 236?

A. Let me locate it. There is a letter dated June 25, 1973, signed by the then Secretary of Commerce, Mr. Damian Folch, addressed to Mrs. Milagros Guzman, Director of Personnel of the Central Personnel Office at that time.

Q. What can be gathered from said letter addressed by the then Director of the then Secretary of Commerce, to Mrs. Milagros Guzman, Director of the Personnel Office at that time?

A. In this letter, the then Secretary of Commerce, Mr. Damian Folch, was notifying the then Director of the Personnel Office, Mrs. Milagros Guzman, that the position of Director of the regional office of Aguadilla, that was at that time included in the Competitive Service, he was requesting that it be included in the Non-Competitive, effective the first of July, 1973, he was asking her to include it in the Non-Competitive Service, effective July 1, 1973.

HON. JUDGE:

Q. June or July?

A. July, July.

Q. July.

ALDARONDO, ESQ.: Your Honor, we are referring to and we are submitting as Exhibit five on the part of the defendant, oh, pardon me, Your Honor, at this time the witness is referring to exhibit one which is exhibit three on the part of the defendant, on the part of the plaintiff, excuse me.

HON. JUDGE: Exhibit three on the part of the plaintiff is a letter, no, exhibit four is the letter of June 25, 1973 from Mr. Damian Folch, to Mrs. Milagros Guzman, exhibit number four on the part of the plaintiff.

ALDARONDO, ESQ.:

Q. Witness, what reasons, if any, does Mr. Damian Folch, then Secretary of Commerce, make reference to for the position of Regional Director, position 236 would become a confidential position?

A. Well, the last paragraph of the letter reads as follows, it says: "this action" the action of including in the Non-Competitive Service the position of Regional Director for Aguadilla "is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, the Aguadilla Regional office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given by law. In his capacity, he represents me as Secretary of Commerce, while he also represents our Government." This is the reason that the Secretary of Commerce gives Mrs. Milagros Guzman for including that position within the Non-Competitive Service.

Q. Mrs. Fernandez, it can be gathered from the record of . . . where did the plaintiff work before starting to render his services in the Department of Commerce and in what way, if it can be gathered, did he conclude his work in the previous position?

A. From the record of Mr. Villanueva.

HON. JUDGE: Sure . . . pardon me, colleague, that has been declared by himself, that he previously worked in the Department of Education, he resigned the position to hold the position that he had in the Department of Commerce; that is, even though from the record there arises evidence already presented. Go ahead.

ALDARONDO, ESQ.:

Q. To what position was the plaintiff appointed in the Department of Commerce according to the record?

A. Mr. Ramos Villanueva, according to the record in my possession, he was appointed to position number 236, classified as an Executive Official Five in the Non-Competitive Service by virtue of art. 8B2 of Act No. 345.

Q. From what document in the record can the information you give be gathered?

A. It is from the OP11 Form, Notice of Appointment and Oath.

Q. According to the record of Mr. Ramos Villanueva what were the tasks, the functions, the duties that Mr. Arturo Ramos Villanueva performed as Regional Director?

A. According to how it is described in the classification questionnaire for position 236 of Executive Official Five, Director of the Aguadilla regional office, basically his functions were directed to, it says here: he shall classify, direct, supervise, and evaluate all the technical and administrative activities related to commercial development programs in the region of Aguadilla. He was responsible for establishing those working methods that will ensure the attainment of the objectives of the Department in his region. The classification questionnaire enumerates . . . ten functions.

Q. The classification questionnaire, Your Honor, the witness is referring to, we are going to offer it formally as Exhibit five on the part of the defendant.

VERA, ESQ.: Your Honor, that was one of the documents over which there had been an objection on our part, that there had not been a stipulation on our part, that we reiterate our objection, since it is a document that no one knows when it was made, in what manner it was made nor if the plaintiff knew about it and that's the reason for our objection.

Q. That classification questionnaire, where is it on this very day?

A. The original of this classification questionnaire is in possession of the Central Personnel Office.

Q. And the copy, the copy of the same?

A. The copy is the one I have here and it is dated June 27 of '73.

Q. What kind of document is that?

A. It is an official document.

HON. JUDGE:

Q. This copy, who issues it?

A. The . . .

Q. That is, the copy is a copy of an original that is where, you tell me, in the Central Personnel Office in San Juan.

A. Personnel. That is a photocopy of the carbon copy.

Q. Ah, that is, ah.

A. This is a carbon copy.

Q. Now we got it, Marshall, allow me then to see before determining the copy that you have? What I would like, before determining if the document is admitted or not; that is, here I see a signature and it is whose signature? This one that is here on the back? Can it be . . . taken?

A. Taken from the record.

Q. Rafael it says here, Cardona Santiago is it?

A. No, Cordero.

Q. Cordero Santiago, that is, this document was prepared in the Department of?

A. In the Department of Commerce.

Q. Of Commerce. And the date on which the document is prepared is what date?

A. Well, from there arises that is the twenty something of June.

Q. Twenty-seven (27) of June of '73. On what date was the gentleman appointed?

A. The 10th of July, the 10th or 11th of July.

Q. The 11th of July?

A. Yes.

Q. One last question. When the person was interviewed for selection purposes for the office, or not that you know, is he shown or is he given a copy of this classification questionnaire?

A. Well, what I do as Personnel Director is I give it to him; now, at present. I was not the Personnel Director when he was appointed, you see.

Q. I understand.

A. Now, the norm was, that it ought to be that a copy of his classification questionnaire should be handed over so that the employee can find out what are the functions that he is going to perform and based on what functions is he going to be evaluated.

Q. Sure, that sound logical. The question is, if in any way is there a record, that you know of, that Mr. Ramos Villanueva was given a copy of that questionnaire or was informed of the content of that classification questionnaire at the time of being interviewed and the appointment procedures?

A. No, I do not know.

Q. Any other additional question from the parties in relation to . . . so as to determine if . . .

A. Now, at present Honorable Judge, it is a requirement, the regulations so establish and to comply with said regulations, the employee has to be given a copy of the classification questionnaire by virtue of the new Law.

ALDARONDO, ESQ.:

Q. What was the practice, if you had any knowledge, that he followed for appointing a person? Do you know if he was given it?

A. I can answer you in terms that the correct thing was to give it to him. I, since I have been the Personnel Director of the Department of Commerce from December first of '74, ah, if I do not hand it over myself, I give orders for it to be handed over; each time any employee is appointed he is given his classification questionnaire.

HON. JUDGE: Very well, the Court then admits the document with a note that it shall be recorded that there is no certainty, at least on the part of the defendant, that before the defendant accepted his appointment they used to inform or let him know or handed over a copy of the questionnaire at that time, but the questionnaire for the purposes of the determination of the Department of Commerce and approved thus by the Central Personnel Office that those were the functions for the position that he occupied; the document in that sense is admitted.

ALDARONDO, ESQ.: What is the number of the document?

HON. JUDGE: The corresponding exhibit number, clerk?

CLERK: Seven.

HON. JUDGE: To this document as evidence on the part of the defendant.

CLERK: Seven.

HON. JUDGE: Exhibit seven on the part of the defendant, with the exception we have stated.

ALDARONDO, ESQ.:

Q. How many Regional Directors does the Department of Commerce have?

A. There are nine Regional Directors.

Q. As Personnel Officer, under what services are the Regional Directors on the Department of Commerce included?

A. They are included the nine of them, the nine positions are included within the confidential service.

Q. Why are said positions within the confidential service?

A. Because the contention is that the Regional Directors represent the Secretary of Commerce in each one of the regions. They end up being like mini Secretaries of Commerce in each region. And . . . in addition to that, well, they are the persons that have the responsibility of implementing the public policy of the Department of Commerce in relation to the services rendered to the business community.

Q. When is it that they start to create this position of Regional Director in the Department of Commerce?

A. Well, I could not tell you exactly the date in which these positions were created, but I can indeed tell you, I can go back . . . the Department of Commerce is created in a centralized form and around the years '69 to '72 the concept of regions was beginning to be dealt with and then it was that the Budget Bureau was approached for the creation of the regional offices and the positions of Regional Directors. It was around those years.

Q. Very well, and when you speak of centralization of the Department around '72, what is it, what is it that you are referring to, a change in policy of what kind?

A. Well, in terms of, changes taking to the regions of Puerto Rico, you see, the functions of the Department of Commerce in terms of direct service to the commercial sector and industrial sector, while it was not, while it was centralized, these services had to be rendered out of the San Juan Office.

Q. In what way is it represented, you testified a few moments ago that the Regional Directors were secretaries, in what way, if any, is it that they delegate that representation responsibility of the Secretary in their person?

A. Well, in the instrumentation of public policy and in the services to be endered to the commercial and industrial sectors in terms of direct service.

Q. What communication, what type of instruction, what type of orders or in what way is that implementation of pub'ic policy of the Department in the region coordinated with the Regional Directors at central level?

A. Well, eh, it is normally done for purely technical matters; it is done through an Assistant Secretary of the Domestic Commerce Program.

Q. And these Regional Directors herein, who is the supervisor of these Regional Directors?

A. The direct supervisor is the Assistant Secretary of the Domestic Commerce Program. Nevertheless, they really answer to sometimes they answer directly to the Secretary and to the Undersecretary depending on the matter.

Q. When the change in administration occurred were there some Regional Directors who were also dismissed like they did to Mr. Ramos Vallanueva?

HON. JUDGE: Referring to the change in administration in 1977.

ALDARONDO, ESQ.:

Q. '77. At the outset of the change in administration, was there any other Regional Director and if there was, who, more or less, were also dismissed?

A. I believe so. Yes, the Regional Director for the San Juan Office, Mr. Gonzalez Munch was at that time also

dismissed and the Bayamon position was vacant, the one for Arecibo resigned, and the Aguadilla one was removed, that is Mr. Ramos Villanueva.

HON. JUDGE:

Q. Wait. Bayamon vacant.

A. It was. The one for Arecibo resigned, the Aguadilla one was dismissed, Mr. Ramos Villanueva was removed.

Q. Yes.

A. The one from Mayaguez resigned, the one for Ponce was reinstated because it was a Career Position, because he had been a career employee, the Guayama one was kept because even though the position was confidential his incumbent was a career one, the one from Guayama, the Fajardo one was kept because even though the position was confidential his incumbent, Mr. Ramon Martinez had career employee status, then the position for Caguas was vacant and the San Juan one was removed, that is the history of the nine positions.

ALDARONDO, ESQ.:

Q. And based in your experience in the area of personnel, that you informed in this Court, that is close to how many years?

A. I started to work in he area of personnel in 1963.

Q. Where?

A. In the Central Personnel Office.

Q. And up to when were you working in the office . . .

A. I worked uninterruptedly in the Central Personnel Office up to 1974, when I was promoted to the position of Regional Director in the Department of Commerce.

Q. Based on your experience in the personnel area, could you tell us if for the position of Regional Director there

is a need for a person of similar political affiliation to that of the Secretary of the Department of Commerce and why?

A. I believe that if a Regional Director, based on the practice, should indeed have the same political affiliation as the Secretary of Commerce because he is the person that in thinking has to be compatible in terms of the implementation of public policy. He represents the Secretary of Commerce in his region, who on occasions has to assume the representation of the Governor.

Q. On what date was the present Secretary of Commerce appointed?

A. The present Secretary of Commerce was appointed on the 20th or 21st of January of '77, I am not sure if it was the 20th or 21st of January.

Q. On what date, according to the record, was the plaintiff dismissed from his position?

A. He was dismissed on February 3, 1977.

Q. Eh?

HON. JUDGE:

Q. The letter of February 3rd effective the 7, document admitted in evidence.

A. Yes, that is correct.

ALDARONDO, ESQ.:

Q. What action, if any, do you know was taken at the outset of the change of the record with the personnel of the Department of Commerce?

HON. JUDGE: No . . . would you be so kind colleague as to repeat the question, no . . .

ALDARONDO, ESQ.:

Q. Yes. What measure did the Secretary as such, take his representative in regard to the confidential position

that existed in the Department of Commerce at the onset of the electoral change?

A. Ah, the Secretary of Commerce asked for a report in relation with the positions of trust and an analysis of the rights the incumbents had to those positions by virtue of what was in effect of the Personnel Act.

Q. Who prepared that report for the Secretary?

A. That report to the Secretary was prepared by the Assistant Secretary of Administration and I.

Q. When was said report prepared?

A. That report was prepared around the month of December of '76.

Q. Prior to the date?

A. We, this, and it is the same report that was submitted to Mr. Damian Folch in December of '76.

Q. How, could you explain to the Court how this thing that it was the same report that was presented to the previous Secretary in 1976, Mr. Damian Folch, is presented to the new Secretary on his coming into office?

A. When the change in administration occurred in November of '76, that at that time was Acting Secretary of Commerce, Mr. Ivan Díaz, asked the Administrator to prepare a report of transition in relation with the Department of Commerce activities, of course, I had to deal with the personnel area, then I prepared the report explaining to him the situation that existed in the Department in relation to the personnel, the rights that each one had as employees under the Personnel Act and what was understood to be what was in effect was the same report submitted to Damian Folch in December 1976, was the one that was submitted to Mr. Juan H. Cintron on January 1977?

Q. And according to what document, if any, was it that Mr. Juan Cintron, present Secretary of Commerce, acted on the determinations regarding personnel?

A. Well, he, reports were handed to him, he received them, he, I know, was advised by our legal division, the Department of Commerce has a legal division, and prior to that he made some determinations which ended in the dismissal of Mr. Ramos Villanueva.

Q. And, do you know Mr. Ramirez de Arellano?

A. Yes, sir; I know him.

Q. And who is Mr. Ramirez de Arellano?

A. That gentleman was Assistant Secretary of the Economic and Planning Program of the Department of State.

Q. Do you know when was it that Mr. Ramirez de Arellano was appointed to the position . . .

A. Assistant Secretary of the Economic and Planning Program of the Department of Commerce.

Q. Do you know when or on what date was he appointed as Assistant Secretary in said program?

A. It was in March of '77.

Q. Mr. Ramirez de Arellano before that date in the Department of Commerce?

A. No sir, he did not work there.

Q. Who is Mr. Hector Reyes?

A. Mr. Hector Reyes is an employee of the Department of Commerce, presently occupying the position of specialist in commercial technics five.

Q. Concerning the hierarchy of the Department of Commerce what relevance, if any in terms of public policymaking in the agency does Mr. Hector Reyes have?

A. At present he does not have any type of rank for policymaking, he holds a technical position.

Q. A position?

A. Technical as a line employee. But I must clarify that at a given moment, he was Assistant Secretary of Administration.

Q. While, you testified that during the past administration you, the position of Personnel Director have you been occupying it since the middle of the past administration?

A. Since the first of December, 1974.

Q. What, if anything happened in regard to the approval of a confidential positions plan in the past administration?

A. Due to the new Personnel Act coming into effect, Act No. 5 was submitted on request of the Central Personnel Office then director, Mrs. Milagros Guzman, confidential positions plan was submitted to her, undersigned at that time by the previous Secretary of Commerce, Mr. Damian Folch.

Q. On what date was handled said . . . was the request for approval of the confidential position plan made to Mrs. Guzman by the Department of Commerce?

A. I do not have the document here, but that request was made, was submitted in August or in September of . . .

Q. Of what year.

A. From '76, but I do not have the document here.

Q. Could you indicate to this Honorable Court what are those documents that you are being shown?

A. This is the, the communication written to Mrs. Milagros Guzman submitting the confidential position plan the first of September of '76.

Q. We are going to request, Your Honor, that it is, among the documentary evidence to be offered, in whose

admission as evidence there is a controversy on the part of the plaintif, it is paragraph four and five of the letter dated September the first '76, the confidential positions plan which was submitted to the previous Personnel Director has been identified as the plaintiff and we propose to offer it as evidence, so it may be marked as exhibit seven unless the party, eight.

VERA, ESQ.: Objection.

HON. JUDGE: Basis for objection.

VERA, ESQ.: Objection, Your Honor, because it happens that we have a document that is in evidence in which it is reported in reference to that plan of the first of September of 1976, that the position of Mr. Arturo Ramos Villanueva was not included. It was subsequently that it was done, then that document being presented is not valid, as far as this case is concerned. I am referring to exhibit, it is a letter dated January 21, 1977. Pardon me, Your Honor, the exhibit seven on the part of the plaintif.

HON. JUDGE: The exhibit seven of the plaintiff, I ask the plaintiff before determining, if it was answered by the Personnel Office. If there was any action on the part of the Personnel Office in relation to what was stated in that document, the letter of January 21 of '77.

ALDARONDO, ESQ.: In order to offer, Your Honor, it seems to me that the best person who could answer the question is the witness herself who is the Director and she could clear it up.

WITNESS: I have a copy of a document dated September 28 of '76 where the then Director of the Central Personnel Office, Mrs. Milagros Guzman, approved the confidential positions plan that was submitted to her.

HON. JUDGE:

Q. Yes, but there is a document, witness, of January 21 of '77 where it is stated that there are certain difficulties with the position occupied at that time by Mr. Ramos

Villanueva, a communication from the Secretary of Commerce, Mr. Juan H. Cintron, of January 21 of '77, if you do not have it handy, we could make it available for you. The question is if there was any action on the part of the Personnel Office related to what was stated in that communication of January 21, 1977?

A. To this communication of January 21, 1977?

Q. Aha.

A. I do not, I believe not, because there really was no need for an answer, because it is a clarification to the Central Personnel Office, who was questioning the classification title of the position. There is a communication here which explains this very well.

HON. JUDGE:

Q. Which of them?

A. I do not believe that this is it, it is an internal memorandum of January 25, 1977.

Q. Sure, but that was not, was not.

A. But what happens is in this case that when the report of the special change was submitted to the Central Office.

ALDARONDO, ESQ.: With the permission of the, it is announced as evidence on the part of the defendant, which is evidence not stipulated by the parties, number nine, the item that has been placed in the records.

HON. JUDGE:

Q. Very well, before settling that, I ask you then if the communication from the Personnel Office that motivated the letter of January 21, is available; let me explain, that is, in September, you submitted a proposal to the Personnel Office?

A. Yes, sir.

Q. The Personnel Office sends, it is a communication to you, that at some time, that motivates the January 21st letter. Is that communication from the Personnel Office available?

A. It is not available here. I am going to tell you, it is not a communication of, the Personnel Office returned . . .

Q. Very well.

A. The special change report.

Q. But it must have indicated something, that . . .

A. But then the special change report was again submitted for approval to the Central Personnel Office with a letter of explanation.

Q. And that special change C report mentioned in January 21 of '77 is it available? Is one of the documents admitted?

A. It is available.

ALDARONDO, ESQ.: Offered, Your Honor.

HON. JUDGE: Which one is it?

ALDARONDO, ESQ.: It is here as documentary evidence offered by the defendant and objected to on the part of the plaintiff.

HON. JUDGE: Then let us find it to consider it in conjunction with . . .

ALDARONDO, ESQ.: It is number nine in our conference, our conference report.

HON. JUDGE: Which one is it, colleague? Number nine?

ALDARONDO, ESQ.: Yes, the January 25 of '77 memorandum.

HON. JUDGE: January 25 of '77.

ALDARONDO, ESQ.: From the Personnel Director of the Department of Commerce to the Secretary of the Department of Commerce.

HON. JUDGE: Yes, but that is an internal document.

ALDARONDO, ESQ.: That is correct, Your Honor, it is an intra-agency memorandum. That is where the disparity in that one is an Executive Director One and the other an Executive Official Two.

HON. JUDGE:

Q. Very well, that is okay, yes, but, that is, this internal memorandum of January 25, 1977 does not have the answer of the Personnel Office to the January 21 communication, that is, that communication of January 21 presented the matter to the Personnel Office and it was said that some documents had accompanied that communication so that the Personnel Office could arrive at a determination, the question is if the Personnel Office determined and if it did, where is the document where it determines what was presented on the letter of January 21.

A. May I explain?

Q. Yes, go ahead.

A. Well, under the old Personnel Act, Act No. 345, we government employees, had three classifications: the Competitive Service, the Non-Competitive Service, and the Exempt Service. Speaking of the Department of Commerce, there were only two categories of employees: the Competitive Service and the Non-Competitive Service. When the new Personnel Act is adopted, it repeals the titles of the employees that at that time were Non-Competitive and Competitive and in comes a new terminology for the category of employees and then comes what is called Career Service, Confidential Service, in order to formalize the transactions with the Central Personnel Office the agencies had to submit to the Central Personnel Office a report of change for each one of the employees, transferring them in conformance to what was established, the Act

established to the corresponding category, the career category or the positions of trust category. In Mr. Ramos Villanueva specific case, since he was classified before the Law came into effect, he was classified in the Non-Competitive Service, that is why this special C change report is submitted, where he is changed from the Non-Competitive Service to the Confidential Service. These reports of changes are submitted upon request of the Central Personnel Office and the main Director of Personnel, Mrs. Milagros Guzman. At the time that these reports of change are submitted to be effective on the first of September of '76, the classification of Mr. Ramos Villanueva had been changed, had been reclassified from Executive Official Five to Executive Director One; when the confidential positions plan was submitted for consideration to the Central Personnel Office, his position still had not been reclassified and that is why he still appeared in the confidential positions plan that they had approved, he appeared registered as Executive Official Five because that was his classification at the time when the document was submitted, but thus subsequent to the submittal of this document, the Central Office, uh, in answer to a Department's request, reclassified the position of Mr. Ramos Villanueva as Director One. When we go to submit, we submit the special change C report, we already had to give him the classification that he officially had at that time, which was that of Executive Director One. It is that . . .

Q. Yes, we understand.

A. It is that while those changes occurred he was the object of a reclassification.

Q. We understand. Yes, we observed it, it arises from exhibit four on the part of the defendant that indeed that had been done, and in fact, it appears approved by the Personnel Office on October 5, 1976, changing the

classification from Executive Official Five to Executive Director One.

VERA, ESQ.: What date, Your Honor?

HON. JUDGE: October 5, 1976.

VERA, ESQ.: Yes, but look, Your Honor.

HON. JUDGE: Submitted, approved at Department of Commerce level on September 2, 1976.

VERA, ESQ.: But see that any document, every reclassification two months before or two months after 1976, the elections, does not have juridical value, Your Honor; and if that document falls within those prohibitions, well it does not have any value because it has been determined by the Supreme Court of Puerto Rico, Your Honor, precisely it is a case of this Division in which specifically it is said that a change within those prohibitions has absolutely no validity whatsoever.

WITNESS: It does not fall in that period.

HON. JUDGE: Yes it is approved on October 5, 1976, certainly it falls within the sixty days, the two months before and after the elections, in this case, before.

WITNESS: The date of effectiveness was September 1, of '76, is the effectiveness and reclassification it is notified by Form OP 38 of August 31, 1976. On item thirty-five where it says commentaries and explanations.

HON. JUDGE: Quaere.

WITNESS: It is from the report of changes.

HON. JUDGE: Yes, quaere, in regard to this document an approval in October 5 so it be effective retroactively, that was it, we shall take it into consideration. Nevertheless, subject to the latest findings of the Court, we are going to admit the document, we shall examine the whole situation.

A. Yes, if you allow me an explanation.

Q. Surely, my pleasure.

A. And this, the request for reclassification of the position held by Mr. Ramos Villanueva is submitted, this is done in August of '76, the document is not here I cannot be precise as to the date, then on August 31, dated August 31, the Central Personnel Office reclassifies the position, the action for reclassifying occurs on August 31 and it arises from a document that is a report of change number thirty-eight, then afterwards . . .

Q. Is that report of change available or has it been offered in evidence?

A. No, it is not here.

ALDARONDO, ESQ.:

Q. What is the date of the report of change?

A. That is, the mechanism for reclassifying a position by the Central Personnel Office is through a form entitled OP 38, notice of reclassification of position and this position was reclassified on August 31.

HON. JUDGE:

Q. Very well, but that document, where was the reclassification made?

A. Well, that document is in the possession of the Personnel Office of the Department of Commerce.

Q. And is there not a copy of the record of the employee at central level in the Department of Commerce?

A. Not in the record of the employee because that does not form part of the record, it is in another record.

Q. Documents that are not available cannot be considered. That is the rule, colleague. Go ahead. Good, then this document to which reference has been made, of the first of September of '76, is admitted. It shall be considered together with the rest of the evidence.

ALDARONDO, ESQ.:

Q. Witness, what is the, you were shown the document of September first of '76 and another document, what is that second document that was shown to you, what does the same indicate?

A. Which one are you referring to?

Q. You were shown two documents, the latter of September first of '76.

A. And the approval.

Q. No.

A. This other one?

Q. That other one that you have.

A. This is an account of the positions that were submitted to be included in the confidential positions plan.

Q. We are referring, Your Honor, to the documentary evidence number five announced on the part of the defendant and objected to by the plaintiff, Uh, in conformance with said confidential positions plan, that document . . . when was it that that confidential positions plan was approved?

A. It was approved on September 25, 1976.

HON. JUDGE:

Q. Confidential positions plan approved.

A. The document has the date of September 28, 1976.

Q. Go ahead.

ALDARONDO, ESQ.:

Q. According to said document to what category was the position of the plaintiff assigned and to which position was he reassigned?

A. According to this document the position held by Mr. Ramos Vallanueva was classified as Executive Official Five in the Non-Competitive Service and it was being proposed that it be included in the Confidential Service.

Q. We are going to offer, as exhibit nine, on the part of the defendant, said document which is found in the group of documents presented as evidence on the part of the defendant.

HON. JUDGE: But we need to be told which specifically because they are so many.

ALDARONDO, ESQ.: Yes, Your Honor.

HON. JUDGE: I ask the colleague if it is what was sent as an addendum.

ALDARONDO, ESQ.: That is correct.

HON. JUDGE: Very well, it had been marked as exhibit eight A, that is the letter exhibit eight and the document attached exhibit eight A; that is, it is part of the same document. Go ahead.

ALDARONDO, ESQ.:

Q. What action, if any, it can be gathered, was taken by the then Director of Personnel in relation to the confidential positions plan that was submitted to her?

A. The then Director of the Central Personnel Office, Mrs. Milagros Guzman, approved this plan.

Q. From where can it be gathered, can it be gathered from a document, that said plan was approved by Mr. Milagros Guzman?

A. From a document, a letter of September 28, 1976.

Q. Your Honor, we are going to refer to said letter and to offer it formally as exhibit nine on the part of the defendant; and it is the letter of September 28, 1976 from the Director of Personnel to the Secretary of the Depart-

ment of Commerce approving the confidential positions plan that was submitted to her.

HON. JUDGE: It is admitted, exhibit nine on the part of the defendant.

ALDARONDO, ESQ.:

Q. What happened, if anything happened, with the confidential positions plan approved by the previous Director of the Central Administration of Personnel Office, Mrs. Milagros Guzman?

A. That confidential positions plan and some other personnel actions were declared, were declared null and void as a result of an opinion of the Honorable Secretary of Justice that had to do with the effectiveness of the Act.

Q. What was the next thing that happened regarding the confidential positions plan in the Department of Commerce after the positions of trust plan was declared null and void in conformance with the opinion of the Hon. Secretary of Justice?

A. Subsequently, then, the new Director and present incumbent of the Director of Central Personnel Office requested that a new confidential positions plan be submitted to him.

Q. On what date, if any, was the new confidential positions plan submitted to the present Personnel Director, Mr. Feijo?

A. That new confidential positions plan was submitted on March 10, 1977.

Q. Your Honor, we are accompanying as exhibit, we request that the letter dated March 10, 1977, by means of which the request that Mrs. Fernandez has just finished indicating is made, be admitted as exhibit number ten on the part of the defendant.

HON. JUDGE: Counsel Vera.

VERA, ESQ.: Yes it is signed, Your Honor, by the incumbent, there is no objection to the letter.

HON. JUDGE: Exhibit ten on the part of the defendant.

ALDARONDO, ESQ.:

Q. In what way or in what way, if any, does the contents in the new confidential positions plan submitted to Feijo, Esq., vary from the previous confidential positions plan that was declared null and void?

A. The Secretary, the new Secretary of Commerce, Mr. Juan H. Cintron, reiterated the same confidential positions plan for the same positions.

Q. What action, if any, did the Central Personnel Administration Office take in regard to the confidential positions plan submitted by Mr. Juan H. Cintron to the Central Office?

A. The Director of the Central Personnel Office, Jose Roberto Feijo, Esq., approved the confidential positions plan proposed by the Secretary of Commerce, approved it dated March 15, 1977.

Q. We submit as exhibit eleven on the part of the defendant the letter dated March 15, 1977 from Feijo, Esq. to Mr. Cintron the confidential positions plan, copy of which is found attached to the records.

HON. JUDGE: Exhibit eleven on the part of the defendant.

ALDARONDO, ESQ.:

Q. What positions were included within the confidential positions plan approved by the Central Administration Office?

A. All directive personnel positions were included: Undersecretary, Special Assistant, Administrative Assistant, Secretary to the Secretary, Secretary of the

Undersecretary, Director of Public Relations, Assistant Secretaries, and the nine Regional Office Directors.

Q. According to the record, after the position of the plaintiff was reclassified from Executive Official Five to Executive Director One, what was the next thing that occurred concerning the personal record of the plaintiff?

A. After the reclassification there is the report of special change that afterwards remained in suspense, you see; and then, after that came the dismissal on February 7, of '77.

Q. Your Honor, that would be all in the examination of the witnesses.

HON. JUDGE: Counsel Vera.

VERA, ESQ.:

Q. With the permission of the Court, respectfully, Mrs. Fernandez when you started as head of Personnel at the Department of Commerce, who was the Director of Personnel at central level for the government of the Commonwealth of Puerto Rico?

A. Mrs. Milagros Guzman.

Q. When you started.

A. When I started in the Department of Commerce.

Q. Of Commerce. And, before your being in Commerce, where were you working?

A. In the Central Personnel Office.

Q. In the Central Personnel Office. Since what year were you there?

A. I started to work in the Central Personnel Office in 1963.

Q. '63. Were you under or when Mr. Frank Romero was head of personnel?

A. Yes, sir.

Q. I ask you whether or not it is true that when this gentleman was head of personnel he made some changes in relation to the requirements for the persons to be appointed competitively and non-competitively, at that time, as indicated by the previous Act?

A. I would like you to be more precise in the question because I do not undersand it.

Q. Yes, that is, if he voided the matter of exams of, to make appointments and, that is, the equivalency of the exams were the interviews and preparation of the individual?

A. No, no, that is, he did not void the exams. What happened is the following: the persons when they hear talk of an exam think th: it is a perfomance exam or a written exam and in the terminology and the persons that are knowledgeable on personnel know that there are two types of exams, the exam in person that is the written performance exam, and exam for which personal appearance is necessary which is an evaluation of the preparation and experience.

Q. Very well, then the more specific question, did he void the written exams?

A. He did not void them totally.

Q. Totally.

A. He did not void them.

Q. But, why do you say not totally, how many did he void and in what phase and in what branch did he void them and in how many did he leave them?

A. I cannot be precise in terms of quantities; but indeed, since I work there I know that in some categories where it was established that the exam was a written one there were changes made for the exam to be an evaluation of preparation and experience.

Q. That is, what you cannot tell us, is precisely how many of those exceptions were made, but you know that those changes were made?

A. They were made. And I could add furthermore, there are some categories for the, there are some categories of positions for those that have never been established that is a written exam, a category of, category of lawyer, for example, always, all the time the examination has been one of evaluation, preparation, of experience, of academic standing, of graduation, of passing grade in the bar exam, those are points that are taken to give them a passing grade, that has always been that way.

Q. Always, but my question is what was not always but rather from the time Mr. Romero started.

A. Yes, there was change.

Q. There was change, very well. You have stated Mrs. Fernandez, that those documents of, the areas that cover the employee you now hand them over to the persons that held those positions?

A. They are, it is established as a requirement of the personnel regulations, it is mandatory.

Q. It is mandatory. That is, that the requirement for personnel is that a copy of . . . be handed over. You stated also that you could not assure the Court if you handed over that copy to Mr. Ramos Villanueva?

A. That is correct.

Q. Is correct. And that you, who prepared that, those areas of functions of Mr. Ramos Villanueva? Those that you have on your record.

A. Since, since this is prepared in 1973. I could not tell you who did it, normally it would have been prepared by the Assistant Secretary of the Domestice Commerce Program.

Q. Very well.

A. Who is the one that knows thoroughly, the one who should know what is to be considered.

Q. Very well, listen and we are going now to ask you some questions, to the story that you, that you have called the story of the nine positions and, we are going to return to that story that you have stated, I ask you, Mrs. Fernandez, if it is true or not that the Ponce Director and the San Juan one were reinstated in other positions, the one for Ponce, and the one for San Juan, the gentleman . . . I am going to say, the one from San Juan and the one from Ponce.

A. No, the San Juan Regional Director.

Q. Aha.

A. Was dismissed from the position.

Q. Was dismissed from the position?

A. Was not reinstated.

Q. Do you know the name of that gentleman?

A. The name is Pedro Gonzalez Munich.

Q. He has not again worked for the Government?

A. He is not in the Department of Commerce.

Q. He is not in the Department of Commerce. That is, that you could tell the Court that he never worked in the San Juan office after he left one of the nine positions?

A. Mr. Gonzalez Munich.

Q. Yes, the one who was in San Juan.

A. After being dismissed from the position of Regional Director?

Q. Yes.

A. Of course, he appealed his case before the Personnel Board because he was dismissed.

Q. That is, he has not worked, he did not work anymore, after he was dismissed?

A. I do not know, not in the Department of Commerce.

Q. Very well, in any other Department if you know?

A. I do not know.

Q. And the Ponce one?

A. The Ponce Director was Mr. Cristobal Cancel.

Q. Aha. What happened to Cristobal?

A. This gentleman, previously was, had been an accountant, was a career employee of the Department of Commerce that was promoted to Regional Director, then the present Secretary of Commerce reinstated him in a position like the one he previously held before being Regional Director.

Q. Good, that is, he was dismissed also from the position?

A. He was removed and reinstated in an equal position.

Q. He was reinstated in another position. Arecibo and Mayaguez, did they resigned?

A. Arecibo and Mayaguez resigned.

Q. Do you know if they received the same calls the ones from Arecibo and Mayaguez that the plaintiff stated, do you know?

A. No, I do not know about that.

Q. That is, I ask you, Mrs. Fernandez, if it is true or not that you are in a different area to the persons mentioned by Mr. Ramos, that it is a different personnel area, or do you have anything to do with those persons?

A. No, I am not.

Q. No.

A. Well, the relation that there is between . . .

Q. That the Guayama one remained.

A. He remained, yes, sir.

Q. And that, that one was transferred to San Juan, that one was promoted, no?

A. That was, that gentleman, that is Mr. Jose A. Rivera Rivera.

Q. Aha.

A. He was relocated in a similar position in the San Juan central office.

Q. Very well, and the one from Fajardo, that one stayed?

A. The one from Fajardo, unfortunately, died.

Q. Died, due to the same calls or does it have any relationship with or for other reasons?

A. I do not know about the calls, really, because I do not know of the calls; never, neither was I informed, nor were they made in my presence, I do not know about the calls.

Q. Very well.

HON. JUDGE:

Q. But, he died some time later?

A. He died, Monchito died in . . . '68.

VERA, ESQ.: Very well, '68.

HON. JUDGE: There is no relation to the calls, the time span is too long.

VERA, ESQ.:

Q. Uh, you stated Mrs. Fernandez that even though you deal with personnel, that you believe, that in your opinion these nine positions should have also been from the same party as the Secretary of Commerce, of the same political party because he is the one who represents him over here?

A. That is a, that is a very personal interpretation of mine.

Q. Very personal of yours. Uh, but in some other way is that personal opinion of yours what is commented in your office circles, that of the bosses, you up there?

A. No.

Q. When you speak of that.

A. No, because to me, to me, personally, in the Department of Commerce no political topics are mentioned.

Q. No political topics are mentioned?

A. No political topics are mentioned.

Q. And, in any way, do you know if any of the political affiliations, that you agree with and is your personal opinion that they should have, that these nine persons should have, had to do with these, with the transfer of those nine persons?

A. Pardon me, the question again.

Q. If the personal opinion of yours that these nine persons should be of the party, the party in power, do you know whether that had anything to do with the change involving those nine persons?

A. I do not have any knowledge of that.

Q. You do not have . . .

A. No one ever spoke to me about that.

Q. No one every spoke to you about that?

A. That was never spoken about.

Q. That personal opinion of yours did you manifest it to anyone.

A. No, no.

Q. Person on your Department?

A. For the first time the question has been brought out in a surprising manner . . . and I answered it.

Q. Upon being surprising the . . . you were prepared not to answer it?

A. He asked it in a surprising manner.

Q. Listen, and this Mr. Ramirez de Arellano you say was Assistant Secretary in the Department of Commerce?

A. Assistant Secretary of the Commercial Economic Planning Program, that is how the office is officially titled.

Q. But where does he worked, in what place? In the same place where the Secretary was?

A. In the same building, and where I also work.

Q. But in relation to the Secretary and the Undersecretary, where was this gentleman, on the same floor, on a fifth floor, or on a first floor or in the basement?

A. No, the Department of Commerce occupies a third floor, we are all on the third floor.

Q. All are on a third floor. Uh, you say that he was appointed on March of '77?

A. Yes, sir.

Q. And before that, where was this gentleman Ramirez de Arellano, if you know?

A. I had never seen him, and I did not know him.

Q. You did not know him. Is there any other Department on the same floor of the building of yours, of Commerce?

A. The Department of Social Services is there.

Q. The Department of Social Services. The matter is that on March '77 he went on, he was appointed in the Department of Commerce this gentleman?

A. Yes, sir.

Q. Do you personally know this gentleman?

A. Yes, I know him.

Q. After the elections you did not see him around there, on your floor, over there, in the . . .

A. No, I did not know him previously, that is, I saw him for the first time.

Q. Aha.

A. When they introdu . . . when they took him to my office to handle his appointment.

Q. Ah, that is, when they took him to your office to appoint him quickly?

A. To appoint him.

Q. Very well.

A. No, no, I had not seen him before, I did not know who he was.

Q. I should understand that this gentleman has a lot of pull in your Department, because if they take him to your office to have him appointed quickly he is a gentleman that has pull in the Department of Commerce?

A. He must have pull with the Secretary.

Q. Very well.

A. Who was the one who . . .

Q. Was it the Secretary who took him?

A. No, the one to take him to my office was the Undersecretary of Commerce.

Q. Undersecretary. And Hector Reyes, you stated, clarified that he was indeed the Secretary of, Assistant Secretary of Administration. Listen, you described the problems with the confidential positions plan that were

sent, first to Milagros Guzman, then to Mr. Feijo, and definitely was it on March 10 of '77 that that plan was approved, I ask you.

A. Definitely.

Q. Aha.

A. It is approved on March 15 of '77.

Q. 15th of March. And why then, if it definitely was on march 15, why this document . . . I would like to identify it with the corresponding exhibit.

HON. JUDGE: It correspondes to exhibit six on the part of the defendant. Show him this one, the one duly marked.

VERA, ESQ.:

Q. If you say that it was on March of '77 that the confidential positions plan was definitely approved, would you please tell me, what is this doing here, of the 7th approved on February 16 of '77 after the dismissal of the plaintiff?

A. That is . . . a report on change of removal.

Q. The report of change of removal?

A. That is it.

Q. That is,

A. Of dismissal.

Q. Of complete dismissal, that when there is a dismissal a report of complete separation is made?

A. Yes, sir.

Q. But you had not yet received the approval of that plan that had been submitted there, how do you carry out this change of dismissal if it is in March that the plan that you submit to personnel is approved?

A. Remember, counsel . . .

Q. Aha.

A. That we had submitted a confidential positions plan to the previous Personnel Director and they had approved it on September 28 of '76, for our effects this plan approved by the Personnel Director Milagros Guzman was in effect until February, precisely at the end of February, I believe it was, that the Hon. Secretary of Justice issued the opinion saying that the acts taken by the Personnel Director at that time were null and void.

Q. What date? What was the date the decision of the Secretary of Justice was made?

A. I cannot tell you the exact date, but I imagine that the lawyers here should know exactly the date of the opinion, but it was in February.

Q. In February?

A. The opinion of the Secretary of Justice.

Q. And this was before or after the opinion of the Secretary of Justice?

A. Before.

Q. Before the Secretary of Justice?

A. It means that as far as I was concerned, the approval of the confidential positions plan of the previous Personnel Director was still in effect.

Q. Very well, then, when the decision of the Secretary of Justice comes into being it is that you submit again?

A. It is when the new Personnel Director asks the Secretary of Commerce, that he has to submit a new confidential positions plan.

Q. Very well, but you had already, you had . . .

A. That action had been taken according to the determination that had been made.

Q. Your determinations, without being approved by Personnel?

A. Ours, approved by Personnel by the previous Director.

Q. But made null and void afterwards by the Secretary of Justice, isn't that so, and you accepted that reversal from the Secretary of Justice?

A. Uh, we do not have the power for accepting or not accepting.

Q. Good, good. That is, the situation is that on March, is it, that the new plan that you submit to personnel ends up being approved?

A. Aha.

Q. Is it so?

A. March 15.

Q. March 15. I wish you would do me the favor, referring to the exhibit, that it would then be Your Honor.

HON. JUDGE: Exhibit six on the part of the plaintiff.

VERA, ESQ.:

Q. Referring to exhibit six on the part of the plaintiff, if you would do me a favor and tell me if you made this document or you dealt with it?

A. Yes, that was prepared in my office.

Q. In your office, was position 236, held by Mr. Arturo Ramos, a regular position in August of '76?

A. No, sir.

Q. What does it say there on that document?

A. The word "regular" was typewritten there and was crossed out.

Q. Crossed out?

A. It was an error.

Q. Who crossed that out?

A. That was crossed out by the central personnel office.

Q. Central Office?

A. It was an error of the secretary.

Q. Error of the secretary. I ask you, if that error of the secretary was before or after sending it over there to the Central Personnel Office where it says that that document was approved?

A. That, that, that anotation of, of . . . handwritten "Non-Competitive" that is from the Central Personnel Office.

Q. Central of the Commonwealth of Puerto Rico?

A. Of the Commonwealth of Puerto Rico.

Q. It is not you.

A. It is not I. That is, they upon receiving it with that error, realized that the position had been marked "regular" without being so and crossed out and put "Non-Competitive".

Q. I ask you is it not standard procedure to return it like they did in that other letter that I showed you, returned it to you so you would correct it, just as Mr. Juan Cintron did, return it to you so you would correct that error.

A. The correct thing would have been to return it, but they usually correct it.

Q. Very well. And the norm was to do it like that, so ugly, just like it is there, like that?

A. There are, there are other similar cases.

Q. There are other similar cases, very well. And this was never corrected by you on noticing a variation like that in ink, this document was not corrected by you over there?

A. Well, it had been corrected, already, that is we received the document with that correction.

Q. And you accepted that correction, like that?

A. Yes, we accepted it like that because it was correct.

Q. It was the correct thing. Did you, in any way, inquired as Chief of Personnel of the Department of Commerce, did you inquire about that erasure, or asked what happened, why they did it, did you excuse yourself for that error committed?

A. Well, no. It was simply received, I noted that it was in order, that is, the correction made was in order, it was in order the correction, that is . . .

Q. And who was it that put the "regular" there?

A. The, the secretary that types that.

Q. Aha. I ask you if you do not check that out as chief you don't, you don't check something as important as that or don't you find it important, about the position?

A. That, that is important.

Q. Would you say that the classification is the key thing in that document?

A. It is not the key thing.

Q. It is not the key thing. The name should be the key thing?

A. Pardon me.

Q. The name should be the most important thing in the document?

A. No.

Q. Would it be the classification?

A. Uh, the key thing is the whole information, but is not exactly the most important thing.

Q. No, you checked this document and in that error that one of your employees had made?

A. The error passed inadvertently, sir.

Q. Inadvertently. And you do not realize it until it is returned to you?

A. That is correct.

Q. And you did not clear it up, with Central Personnel you did not clear up this situation?

A. Uh, it happens that I, the Personnel Division has sections and in each section I have a chief that deals with that, I discussed it with the technician that is in charge of appointments and changes, uh, what had happened, he says to me: "well, that is an error" that got through us, the document was returned to us, corrected and we proceeded to file it. And, if you will observe in the next report of change that was prepared in September of '76 the category of the employee was correctly entered as "Non-Competitive."

Q. You indeed were in on that one.

A. And in the next.

Q. Yes, very well.

HON. JUDGE:

Q. I assume that the technician that dealt with that was given a slight orientation?

A. Yes.

VERA, ESQ.:

Q. With the leave of the Court. Listen, Mrs. Fernandez, and Mr. Diaz Orta, what position did he hold?

A. That gentleman, Mr. Jose Diaz Orta, was a Career Accountant Five, of the Department of Commerce, was promoted, on February 16 was promoted to Assistant

Secretary of Domestic Commerce and then, subsequently the Secretary of Commerce dismissed him from his position and now is in his career position of Accountant Five.

Q. Ah, Diaz Orta also left?

A. He did not leave, the Secretary dismissed him.

Q. Dismissed him.

A. From the position and returned him to the career position that he previously held.

Q. The occasions, Mrs. Fernandez, that you were have been here in relation with this case and the two gentlemen that were with you, was any of those Mr. Diaz Orta?

A. In the first visits that I made to this Court the one who accompanied us was Mr. Diaz Orta.

Q. Diaz Orta. And the other gentleman that used to come with you was not this gentleman . . . Hector Reyes?

A. No, sir, the other person was Atty. Edwin Ruiz.

Q. In addition to colleague Ruiz.

A. No, no one else came.

Q. No one else came. Well, there are no further questions, Your Honor.

HON. JUDGE: Any questions in the cross-examination?

ALDARONDO, ESQ.: Yes, Your Honor, some brief questions.

Q. Uh, in what way is it that they recruit, are the regional directors recruited in the Department of Commerce?

A. The Secretary selects him and submits him for appointment.

Q. Is there any type of examination, test, competition in the selection of Regional Directors?

A. No, sir.

Q. What is the best practice and which, concerning, when a new employee is recruited be it for a confidential position or a career position, what is the best practice, what is the one that should be observed in regards . . . what type of orientation, if any, is he given regarding the functions, duties of the position and so on, what is done with that employee that comes in to occupy a new position?

A. Well, let me . . .

Q. Is it the career service or the position of confidential service?

A. Well, the norm is that the day he is appointed he goes to the office of the person who is head of the appointments and changes and that employee orients him as to the standards, discipline, regulations, and hands him a copy of his classification questionnaire.

Q. That norm is one year old, two, three years old more or less, how much time has that norm been in the system?

A. Well. . . .

Q. In the public administration system in the government?

A. That should have always been that way, of course, I can attest from the moment in which I assumed the direction of the Personnel of the Department of Commerce.

Q. What do you mean?

A. That is, that I can, we could infer that the previous Director did, used to do the same, you see but . . .

Q. It is a conduct and it is the acceptable norm?

A. It is the norm. Now, at present the employee even signs, upon receiving the regulations, the rules of attendance; he signs the classification questionnaire upon receiving it.

Q. Mrs. Fernandez, why was the Ponce Regional Director reinstated?

A. Because previously he held in that same office a career position, that of Accountant Four.

Q. And why wasn't Mr. Ramos Villanueva reinstated?

A. According to, to the documents that we have in our possession he did not previously hold a . . . career position of any kind.

Q. Could Mr. Ramirez de Arellano have called Mr. Ramos Villanueva and make the calls to him that he alleges were made in regard to, was it physically possible for him to make them as an employee of the Department of Commerce?

VERA, ESQ.: Objection, Your Honor. That is a totally speculative question, if Mr. Ramirez de Arellano could have called this gentleman.

ALDARONDO, ESQ.: Being employee of the Department of Commerce, I do not see what is the speculation to the question in his character of agent or officer of the Department of Commerce if it is possible.

VERA, ESQ.: We withdraw the objection, Your Honor. We withdraw it.

ALDARONDO, ESQ.:

Q. Was it possible that Mr. Ramirez de Arellano could call Mr. Ramos Villanueva as an employee of the Department of Commerce?

A. Well, it does not seem to me, because Mr. Ramirez de Arellano was not an employee of the Department of Commerce on or about February the 7th.

Q. When was he an employee of the Department of Commerce, Mr. Ramirez de Arellano?

HON. JUDGE: She said March something.

WITNESS: Not March, I cannot be so precise as to the date.

ALDARONDO, ESQ.:

Q. Why was Mr. Arturo Ramos Villanueva dismissed before. under what authority was Mr. Arturo Ramos Villanueva dismissed before the approval of the positions of trust plan submitted over the Honorable Secretary of Commerce, to the present Director of the Central Personnel Administration Office?

A. The Secretary of Commerce in his February 3rd letter dismissed him, by virtue of Act No. 5 of the Personnel Act in its section 5.10 that states that the confidential employees are of free selection and removal.

Q. That will be all.

A. I must add, you see, that the Personnel Act takes effect on November 30 of '76 and that "expropio legori" [*sic*] the public employees inquire, that is, we stop being employees within the Competitive and Non-Competitive Services and go on to the career and confidential employees on the first of December, that has been determined by the Board and the Courts already.

HON. JUDGE:

Q. Personnel Act took effect? When?

A. On November 30 of '76. Which was when the regulations were promulgated. And regardless of whether or not the reports of change changing the category through a report of change would have been processed, already, automatically, on December the first, the employees were not Exempt or Competitive or Non-Competitive, they were career and confidential. The term had already disappeared.

Q. That will be all with the witness, Your Honor.

VERA, ESQ.: If you allow me, Your Honor.

HON. JUDGE: Yes, Counsel Vera.

VERA, ESQ.:

Q. Uh, Mrs. Fernandez, to the question that the colleague asked you as to whether it was possible that Mr. Ramirez de Arellano would have called Mr. Ramos, you state, that it doesn't seem so to you.

A. That is, as a Department of Commerce employee he could not make calls as an employee of the Department of Commerce because at that date he was not an employee there.

Q. He was not. And how . . .

A. Now, as to whether he was a personal friend of his and he could call him, I do not know.

Q. But you say that he was a friend of his and he was a friend of . . .

A. No, I do not know, I did not know him, I did not know about that man until that date.

Q. You did not know about that man, but that same man that is taken to your office is here present?

A. Yes, sir.

Q. And he went with a gentleman?

A. The Undersecretary of Commerce took him to my office.

Q. The Undersecretary of Commerce. And that is the person that Mr. Ramos states that called him on several occasions. Good. Listen, and you answer to questions by the colleague, that why wasn't Mr. Ramos reinstated, I ask you, and what do you have to say about these matters, these things, these documents; I ask you if you have any knowledge as to whether Mr. Ramos was dismissed due to his being a member of the Popular Democratic Party, a person wholly identified with the

Popular Democratic Party in this area and in San Juan, if you have any knowledge that this was so, the dismissal of this gentleman?

A. No, I do not know.

Q. You don't know. Do you know if in any occasion whatsoever he was politically pressed by your office, politically.

A. From my personnel office, no.

Q. Not from the Department of Commerce, from Commerce.

A. Not that I know.

Q. Not that you know; that is, that you do not have any knowledge that what he said happened could have happened?

A. No, not to my knowledge.

Q. There are no further questions, Your Honor.

ALDARONDO, ESQ.: Your Honor, one last question.

HON. JUDGE: Third examination.

ALDARONDO, ESQ.: Just a little question that's all and we finish.

HON. JUDGE: One.

ALDARONDO, ESQ.:

Q. What principle, if any, do you understand would be violated under the Personnel Act if Mr. Arturo Ramos Villanueva were to be reinstated in a position in the Department of Commerce?

VERA, ESQ.: Objection, Your Honor; look, Your Honor, the basis for the objection if in this country, at this time at this moment persons were to be accused because they commit crimes, look from, I don't want to say from where on down are the jails filled; that question there, we object to it.

HON. JUDGE:

Q. Before that I would have to ask a question, do you feel that Mr. Ramos Villanueva is eligible for any position in the Department of Commerce at present.

A. He was eligible.

Q. Would he be eligible to hold a position?

A. I believe so.

Q. The question of the colleague is if any law has been violated due to some type of appointment. I imagine that it depends which one is it . . . if it is a position to which he might not be eligible, well regulations would be violated, if he is eligible I do not see that . . .

A. On, on answering the question of being eligible it means whether he could opt for a position in the Department of Commerce?

Q. Of course, of course, sure, well whether he can opt for and qualify.

A. Yes, he could opt for it by means of . . .

Q. And if it is one of the ones that do not require as you say an examination in person, that it can be through evaluation and preparation and experience I imagine so. That is, I believe that the lady would not dare to commit herself to say the contrary.

A. Right now we, the notices were published and he qualifies for the positions, I don't know if he applied for them.

Q. Very well, madam, I have some small doubts and since I am the one to settle this at the end, you will excuse me for asking a couple of questions, the first is the following: you stated that the day . . . something of November, November 30th, '76 the Act came into effect, according to your interpretation, the Act entered in "propio vigore" classified the employees, the new

classification established career and confidential, you state that in your opinion the Regional Directors should be of the same political affiliation as the head of the Department.

A. They should be.

Q. That's it, that's why. And that, naturally, is thus now, that is your opinion and . . . the new, that is, the fact that you think it now, but it should have been also the same in, November of '76 and January of '77. Nevertheless, there was one of the Regional Directors and you stated that was not dismissed because even though it was a confidential position and he was a career employee that's what I understood, you correct me.

A. That is correct, Your Honor.

Q. If the Act in its "propio vigore" determined that the position is confidential, isn't the incumbent also confidential in regard to that position by mandate of the Act?

A. No, the incumbent keeps his right to being an employee with career status.

Q. Isn't, I ask, orientation, that is, how is that situation different in relation to the one in Ponce that you tell me that since he held a career position previously, they returned him to the career position he had.

A. Aha.

Q. But now because it is a confidential position he attained, that is, they told him: "look, you cannot remain in that position" and he accepted or whatever he returned to the career position but he had to leave . . .

A. Left the confidential position?

Q. Leave the confidential position. Why didn't the same happened with the one at Fajardo?

A. Because different from the position in Ponce the employee and the position, both the employee and the position were confidential.

Q. Career, the one in Fajardo?

A. No, the Ponce one was a confidential position.

Q. Under what circumstances could you explain to me then, how was it that the position in Fajardo, the incumbent was a career employee above the Act then?

A. Yes, I am going to explain.

Q. You orient me on that.

A. Ah, when the history that we mentioned in the creation of the regions . . .

Q. Aha.

A. When the first regions were created well it was San Juan, Ponce, Mayaguez and the last regions created were, the Guayama one and the Fajardo one and perhaps the one in Aguadilla also. When the creation of the position of Regional Director for Guayama and Fajardo was requested, it was explained to the Central Personnel Office, that it was a Regional Director and that he had the functions of the position, they had characteristics of confidential positions trust; but at that time the previous Personnel Act was in effect, permitting only fifteen positions in the Non-Competitive Service by virtue of Section 8-B2 of the old Personnel Act. At the time when the creation of the last two positions of Regional Director is requested, the Department of Commerce had filled the fifteen positions in the Non-Competitive Service; that is, the Central Personnel Office did not wish to create a position number sixteen and a position number seventeen in the Non-Competitive Service because it would have been a violation of the Act; and they then created it in the Competitive Service, a position clearly with character-

istics of a confidential position, but in the Competitive Service.

Q. That is, that upon creating the Fajardo and Guayama regions there were fifteen confidential positions?

A. The positions had already been filled. That is the same thing that happens with the position for Aguadilla, that were created in the Competitive Service also.

Q. Then that raises another doubt in me, that is, then the Regional Directors of those two regions were less Regional Directors than the others, that is, they did not have the same representation of the Secretary and did not have the same powers?

A. They had the same functions.

Q. Very well. Then the other question. I understood from your testimony and according to what has been quoted, that the Act itself provides that all Regional Directors are confidential positions?

A. Yes sir.

Q. Upon creating those two positions in the Competitive Service isn't there something then that . . .

A. Those positions are created in the Competitive Service prior to the new Act, those positions were created before '72.

Q. What is the Act that provides that all . . . before '75; that is, the Act that provides that all the division heads are . . .

A. It is Act No. 5 of 1975, the new Personnel Act.

Q. Act No. 5 of 75, October?

A. Yes.

Q. The division heads no, the Regional Directors?

A. The Regional Directors. At the moment that those positions of Regional Directors are created, it was understood that they were confidential positions, what happens is that the Act did not provide a mechanism to include it in the Confidential Service because of the existing limitation that did not allow more than fifteen positions.

Q. That is, and at the date that Act already the Guayma and Fajardo positions existed?

A. Yes, sir.

Q. The other situation is the following: in September of '76, Mrs. Milagro Guzman, had submitted a plan, the Department of Commerce had submitted a plan to the Central Personnel Office to determine which would be the confidential positions as required by the Personnel Act of October, 1975, which plan after being approved was declared null and void by an opinion of the Secretary of Justice of February, 1977, as you have stated. My question is, what knowledge did the Department have, if it had any knowledge, that you know of, that that confidential classification plan was under study by the Secretary of Justice, on the 7th of February or on the 3rd of February when the dismissal letter is sent to Mr. Ramos Villanueva?

A. No, we did not know, we had no knowledge of that.

Q. Then the last one is the following: If the Personnel Act provided that certain determined positions were confidential, by law, by mandate of the law, what is the reason for having to submit a proposal to the Central Office, recommending that certain determined position be classified as confidential positions if the Act itself had made them confidential positions?

A. I imagine that it was for the implementation. That is a question that would have to be asked to the then Personnel Director and the present Personnel Director.

Q. That is, lets say now to Feijo, Esq.?

A. Yes. Pardon, it is that Act, the Act in a one part says: "the agencies shall submit a confidential positions plan to the Central Personnel Office", the Act there, there is a place where it establishes this; that is, it is a provision of the Act. Each agency says here, Section 5.11 of the Law: "Each agency shall present for the approval of the Office, a plan containing the confidential positions by which it desires to operate."

Q. Very well, if that was the mandate of the Act, I ask you then where does that leave your prior statement that by "propio vigore" the Act classified some positions as confidential if the Act required that they be submitted to the Central Personnel Office for approval?

A. Well, this, stems . . .

Q. Or what the Act requires is a mere notice? That is, did that plan have to be approved or simply notified? Which of the two?

A. It says: "each agency shall present."

Q. Aha.

A. It says: "the Office shall intervene to determine if the plan on confidential positions complies with the provisions of sec. 5.10," which are the ones that . . . ah, identify the positions, but that another section of the Law clearly establishes and says: "the employees who at the same time this Act takes effect are holding positions in the competitive service, shall become . . .

Q. Non-Competitive.

A. . . . Shall become career employees, the employees who at the time this Act takes effect are holding positions in the Non-Competitive service shall become confidential employees. The act points them out.

Q. We are aware of that. I have already dealt with that, with that provision. Any questgion from the brother counsels on matters covered by the Court?

ALDARONDO, ESQ.: None, Your Honor.

VERA, ESQ.: None from our party.

HON. JUDGE: You may leave the stand, madam, thank you very much.

CERTIFICATION

I, JUDITH FELICIANO DE HERNANDEZ, Court Stenographer of the Superior Court of Puerto Rico, Aguadilla Division, Puerto Rico, hereby CERTIFY:

That the above is a faithful and exact transcript of the notes taken by me, in the tape recorder, during the hearing of the above-captioned case, the 15th day of April, 1980.

And for the record I enter my signature in Aguadilla, Puerto Rico, this 10th day of September, 1981.

/s/ Judith Feliciano de Hernandez
JUDITH FELICIANO DE HERNANDEZ
Stenographer

I DO HEREBY CERTIFY: That to the best of my professional knowledge this is a correct, exact, and faithful translation into English of the original document in Spanish.

/s/ Nellie Diaz de Gorbea
NELLIE DIAZ DE GORBEA,
Professional Translator